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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR GUERRERO and AMY LAY CABBEL, Defendants and Appellants.	F066730 & F066753 (Fresno Super. Ct. No. F10902996) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Kat Kozik, under appointment by the Court of Appeal, for Amy Lay Cabbel, Defendant and Appellant.

Kyle Gee, under appointment by the Court of Appeal, for Victor Guerrero, Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On the evening of June 5, 2010, Juan Gonzalez (Gonzalez), Jose Jacobo (Jacobo), and Teofilo Mendoza (Mendoza) were leaving a bar when they met 18-year-old Princess Hernandez (Hernandez) and 20-year-old Sonia "Lil' One" Miranda (Miranda). They drove the two young women back to Gonzalez's apartment, where they drank beer and used drugs. In the early morning hours of June 6, 2010, the young women asked the men for a ride home. Gonzalez drove Jacobo and the two young women to an alley in west Fresno based on their directions about where to leave them. As the women walked away from Gonzalez's car, two suspects suddenly appeared in the alley, accosted Gonzalez and Jacobo, and demanded their wallets. Gonzalez and Jacobo resisted. Gonzalez was fatally shot in the head and Jacobo was stabbed multiple times. The suspects fled and Jacobo staggered into the street for help.

The investigation revealed the two suspects in the alley were Victor "Mousie" Guerrero (Guerrero) and Juan "Pelon" Sanchez (Sanchez); that Guerrero shot Gonzalez and Sanchez stabbed Jacobo; and the alley was very near Francisco "Cisco" Gutierrez's (Gutierrez) apartment. Several hours before the robbery and murder, Hernandez, Miranda, Guerrero and Sanchez had been at a party at Gutierrez's apartment, where they discussed a plan for the two young women to go to a bar, meet some men at random, get money and/or drugs from them, lure the victims outside, and Guerrero and Sanchez would rob them.

Hernandez and Miranda later offered conflicting evidence whether Gutierrez had participated in or knew about the plan. However, they testified Amy "Clumsy" Cabbel (Cabbel) drove Guerrero, Sanchez, and the two young women to a bar, and Cabbel gave them further instructions while they were in her car. Shortly after Gonzalez's body was

found in the alley, his cell phone was used to call the cell phone numbers for Cabbel and her boyfriend.

In this case, Guerrero and Cabbel were charged and convicted after a joint jury trial of conspiracy to commit robbery (Pen. Code, § 182, subd. (a)(1));[1] first degree murder of Gonzalez, with the special circumstance that it was committed during the commission of a robbery (§ 187, subd. (a); § 190.2, subd. (a)(17)(A)); attempted premeditated murder of Jacobo (§§ 664/187, subd. (a)); and other charges and enhancements. They were both sentenced to life in prison without possibility of parole.

The chief prosecution witnesses were Hernandez, Miranda, and Gutierrez. Hernandez and Miranda were initially charged with the same offenses as defendants, but they pleaded guilty to conspiracy to commit robbery and voluntary manslaughter, pursuant to an agreement to testify truthfully for the prosecution, after which they would be sentenced to 11 years in prison. The plea agreement was not contingent on the conviction of Guerrero or anyone else for the crimes.

During the investigation, Gutierrez was detained while wearing shoes that contained Gonzalez's blood, Gonzalez's vehicle registration was found in Gutierrez's apartment, and Gutierrez eventually admitted that he moved Gonzalez's car away from his apartment building. Gutierrez was not charged with any offenses arising from this case, and there is no evidence he received any benefits for his testimony.

Sanchez was never found, and the police believed he escaped to Mexico.

On appeal,[2] Cabbel and Guerrero have filed separate appellate briefs but join in each other's issues. Defendants raise several issues about the testimony from Hernandez, Miranda, and Gutierrez. The jury was instructed that Hernandez and Miranda were

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] On February 19 and 20, 2013, Guerrero (case No. F066730) and Cabbel (case No. F066753) respectively filed timely notices of appeal. On June 7, 2013, this court ordered both appeals consolidated under case No. F066730.

accomplices as a matter of law and their testimony required corroboration, but that it was a question of fact whether Gutierrez was an accomplice whose testimony also required corroboration. Defendants argue Gutierrez was an accomplice, the jury was not properly instructed on how to determine whether Gutierrez was an accomplice, and instructional error was prejudicial because there is no independent evidence to corroborate the testimony of Gutierrez. They separately argue there is no independent evidence to corroborate the testimony of Hernandez and Miranda.

Defendants also challenge the court's decision to grant the prosecution's motion to admit Gonzalez's cell phone records. These records were obtained by subpoena directly from the cell phone carrier, and indicated that Gonzalez's cell phone was used to call the cell phones of Cabbel and her boyfriend shortly after Gonzalez was murdered. Defendants argue the documents were inadmissible hearsay, the prosecution failed to properly authenticate the records because of alleged flaws in the custodian's declaration, and the error was prejudicial because the prosecution relied on the records to corroborate the accomplices' testimony against Cabbel and to support her convictions.

Defendants contend there is insufficient evidence to support their convictions as aiders and abettors for the attempted premeditated murder of Jacobo, who was stabbed by Sanchez.

Cabbel separately argues there is insufficient evidence to support the jury's finding on the special circumstance for the murder of Gonzalez because she was not a "major participant" who acted with "reckless indifference to human life."

We affirm the judgment as to Guerrero. As to Cabbel, we affirm her convictions but reverse the special circumstance as to count II, first degree murder of Gonzalez.

FACTS

Gutierrez's apartment

Francisco "Cisco" Gutierrez lived in a first-floor apartment on East Amador Street in west Fresno. Gutierrez testified he was a "recreational" user of marijuana and methamphetamine. He used the drugs every day so he could stay high.

Gutierrez testified that defendant Victor "Mousie" Guerrero lived with him.

Hernandez and Miranda occasionally stayed at Gutierrez's apartment. At the time of the murder, Hernandez was 18 years old and Miranda was 20 years old. Hernandez and Miranda testified they were addicted to methamphetamine, and Gutierrez supplied them with drugs. Gutierrez allowed Hernandez and her two-year-old child to stay with him since her family threw her out because of her drug addiction.

Hernandez and Miranda testified they used to see Guerrero and Julio "Pelon" Sanchez at Gutierrez's apartment.

Rosalinda Gonzalez, who lived in the same apartment complex as Gutierrez, testified there were several people living or staying with him, including Guerrero, Sanchez, and some young women.

Hernandez testified she did not know defendant Amy "Clumsy" Cabbel, but she had seen Cabbel at Gutierrez's apartment on two occasions close in time to the crimes. Guerrero, Sanchez, and Miranda were present on the occasions when Cabbel was there. Hernandez testified Cabbel's hair had blond-colored highlights.

Miranda testified she had known Cabbel for about two weeks before she was arrested in this case.

At trial, Gutierrez initially claimed he did not know Cabbel but admitted the name "Clumsy" sounded familiar. When asked to look around the courtroom, Gutierrez

admitted he recognized Cabbel, he "probably used to hang around with her back in the old days," and he had only seen her twice before the trial.[3]

The party

On the evening of Saturday, June 5, 2010, Gutierrez had a barbeque party at his apartment. Hernandez testified there were about 15 people there, including Guerrero, Sanchez, and Miranda. Everyone was hanging around in the apartment, the back patio, and the carport. They drank beer and used methamphetamine and marijuana.

Miranda testified Cabbel was at the party. Gutierrez testified he could not remember if Cabbel was there. Hernandez testified she did not see Cabbel inside Gutierrez's apartment that night.

The plan

Hernandez testified that sometime after 11:00 p.m., everyone was still at the party. Guerrero and Sanchez spoke to Hernandez and Miranda inside Gutierrez's living room. Hernandez testified Guerrero told the young women they were going to go to a bar so they could meet men and get money from them. Guerrero said they would get a ride to the bar. Guerrero told Hernandez and Miranda "we were going to go inside, just get some guys and … try to get money" by "sweet talking to them."

Hernandez testified Sanchez also said they were going to go into a bar, find men with money, bring the men out of the bar, and Sanchez and Guerrero would beat them up. Guerrero and Sanchez said they would be watching Hernandez and Miranda to make sure nothing bad happened. Sanchez said that he and Guerrero were going to get money from the men once they were outside the bar. Hernandez thought Sanchez said "they were

[3] At trial, Gutierrez testified he could not remember many details about that night because he was stabbed in June or July 2011, lost a lot of blood, and his memory was not the same since that incident.

gonna probably just beat 'em up." No one talked about using a gun or a knife. They would divide the money they got from the men.

Testimony about Gutierrez's knowledge of the plan

Hernandez testified Gutierrez and other people were still at the party when Guerrero and Sanchez spoke to the two young women about the robbery plan, but no one else was talking or listening to them. Hernandez testified she did not know exactly where Gutierrez was during their discussion: "He might have been in the room, I don't know." Hernandez testified Gutierrez did not take part in the discussion, and he did not hear what they were talking about.

At trial, Miranda admitted that when she spoke to the police during the investigation she said that Gutierrez had nothing to do with the crime, and only Guerrero and Sanchez told her about the robbery plan at the bar. However, Miranda testified she lied when she made these statements because she looked up to Gutierrez and did not want to implicate him, but Gutierrez was involved.

Miranda testified that during the party, Gutierrez was the man who spoke to Hernandez and herself about the plan. He talked to them outside his apartment, while Cabbel and Sanchez were standing by a car. Guerrero was not present. Gutierrez told Miranda and Hernandez to leave with Guerrero, Sanchez, and Cabbel.

According to Miranda, Gutierrez told the two young women that "he needed us to rob … these guys." Gutierrez told her to "sweet talk" men in the bar and "see … if they can give me money" and drugs, and then they would share the drugs with everyone. Miranda believed the plan was for the young women to flirt with men at the bar to get money from them. Miranda thought they were going to scare the men into giving them money. Miranda testified Gutierrez told her that Guerrero and Sanchez were "going to … take care of us and they were going to look out for us."

Miranda testified that she believed Gutierrez knew about the plan because she saw him talking with Guerrero and Sanchez the day before the party, and then he made her leave the party with Guerrero and Sanchez and said "they were going to take care of me, that they know what's up."

Hernandez and Miranda agreed to do it. Hernandez thought "it was going to be easy." Hernandez testified she needed money for her methamphetamine addiction. Miranda understood that she was going to steal from some people at the bar. Hernandez and Miranda decided to give fake names and conceal their identities to whomever they met in the bar.

Cabbel's car

Guerrero, Sanchez, Hernandez, and Miranda left Gutierrez's apartment. Hernandez testified she told Gutierrez that she was going somewhere and needed someone to watch her child. Gutierrez and another friend stayed at the apartment with the child.

Hernandez testified Guerrero led them to a four-door car that was already in the apartment building's carport. Hernandez testified that Cabbel was sitting in the driver's seat. Hernandez testified Cabbel had not been inside the apartment when they discussed what they were going to do at the bar.

Hernandez testified Guerrero asked Cabbel to give them a ride to the bar. Hernandez, Miranda, and Sanchez got into the back seat. Guerrero got into the front seat and Cabbel drove.

Miranda testified that when she went to the parking lot, Cabbel and Sanchez were already standing by a car. Guerrero and Hernandez joined them. Guerrero got into the front seat, Cabbel was driving, and Sanchez sat in the back with the two young women.

Gutierrez's testimony about Cabbel's car

Gutierrez testified that around 11:30 p.m., Guerrero left the party with Miranda, Hernandez, and Sanchez. Gutierrez and his girlfriend were cleaning the kitchen when they left, and he did not ask them any questions about what they were doing. Gutierrez did not remember if he had a conversation with them before they left, but testified they did not tell him where they were going.

Just after they left his apartment, Gutierrez testified he went outside and saw Guerrero, Sanchez, Hernandez, and Miranda standing by a car in the carport. Gutierrez went upstairs to his girlfriend's apartment and smoked a marijuana joint on the balcony. The four people were standing around the car and talking. He could not see if anyone was sitting in the car. He stayed upstairs with his girlfriend.

Cabbel drives to the El Prado Bar

Hernandez testified Cabbel drove to a gas station and purchased gas, then drove to a bar but did not stop there. At that point, Guerrero talked to Cabbel and told her where to go. Hernandez did not hear anyone tell Cabbel about their plan.

However, Miranda testified that during the drive, Cabbel instructed Miranda and Hernandez to go inside the bar and "take … whatever they give us, to take it." Cabbel told the young women to talk to men in the bar, and not refuse if the men offered to buy drinks or drugs. Miranda testified Cabbel told the young women to "[j]ust talk to them. And don't say no, to take whatever they were offering us." Guerrero and Sanchez also told them to go to the bar and get some money. Guerrero and Cabbel were talking during the drive, but Miranda could not hear their conversation because loud music was being played.

Hernandez testified Cabbel stopped at the El Prado Bar. Hernandez testified she got out of the car with Miranda, and no one else got out or talked to them. Hernandez and Miranda walked toward the bar. Hernandez never saw Cabbel again that night.

Miranda testified that when Cabbel stopped at the bar, Sanchez got out of the back seat so Hernandez and Miranda could also get out. Guerrero stayed in the car. Miranda testified that Cabbel told the young women "to go inside this bar," "see what happens," and "to take everything they were offering us." Guerrero and Sanchez did not tell them anything. Miranda testified Cabbel drove to another location and parked by the bar.

The victims arrive at the bar

Philip Flores (Flores) was one of the security guards at the El Prado Bar. He was stationed in the parking lot and charged patrons to park there. His girlfriend, Marie Gonzalez (Marie), was with him that night. Another security guard was stationed at the bar's front entrance to check identifications.

Around 10:00 p.m., a green van pulled into the bar's parking lot, and Flores collected the parking fee from one of the occupants. The driver and two other Hispanic males got out of the van and walked to the bar.

The men in the green van were later identified as Jose Jacobo and Juan Gonzalez, the victims in this case, and their friend, Teofilo Mendoza. Jacobo and his friends went into the bar and drank several beers.

The suspects arrive at the bar

Flores and Marie testified that around midnight, a white or light-colored four-door vehicle stopped on the street in front of the bar's parking lot.[4] Flores believed there were two men and three women in the car. Flores and Marie testified the driver was a light-skinned woman with blond hair. Flores did not collect a parking fee from this vehicle because it stayed on the street and did not turn into the parking lot.

Flores testified two Hispanic men and two Hispanic young women got out of the car; the female driver did not get out. Flores said one man was bald and had tattoos with

[4] Cabbel's vehicle was later identified as a four-door, light blue Hyundai.

cursive writing on the right side of his neck.[5] Marie thought only one man got out of the car, and he was bald. Marie testified the two women looked "really young."

Flores testified the two men stood face-to-face with the two young women. Flores testified one man faced the young women and talked to them. Both Flores and Marie heard one man tell the two women to " 'go try,' " " 'go try it,' " or " 'go inside and try.' "

Flores and Marie testified the two young women walked toward the bar's entrance. They lost sight of them and did not see if they went inside. Flores testified the two men got into the car's back seat. The car's driver made a U-turn, pulled into the adjoining neighborhood, and then turned into the alley next to the parking lot.

The victims meet the young women

There is no evidence that Jacobo and his friends previously knew Hernandez and/or Miranda. Hernandez testified about how she and Miranda met the victims, whom they apparently selected at random. After the young women got out of Cabbel's car, they walked to the bar's entrance and were approached by three Hispanic men who asked if they wanted to party. These men were later identified as Gonzalez, Jacobo, and Mendoza, who had earlier arrived in the green van.

Hernandez accepted their invitation. Hernandez and Miranda tried to get into the bar, but the security guard stopped them because they did not have identifications. The three men walked away and headed to the parking lot.

Hernandez testified she returned to the parking lot with Miranda, and they stayed there for about five minutes. Miranda had a cell phone, but Hernandez could not remember if she was using it. One of the three men again approached and asked if they wanted to party. Hernandez again said yes. The other two men were waiting at their van,

[5] The prosecution introduced evidence that Cabbel had blond-streaked hair, and Guerrero had a shaved head and cursive tattoos on both sides of his neck. Gutierrez testified he did not have any tattoos on his neck.

and they walked over to the young women and invited them to their house. Hernandez and Miranda agreed, and got into their green van. They gave false names to the men.

Miranda testified that as they left the bar and walked to the parking lot, she sent a text message to Cabbel telling her that that they had been kicked out of the bar. Cabbel replied that she was "coming to get us." They waited in the parking lot and saw three Hispanic men. Two men approached them and one man walked to a van. The two men spoke to Miranda and Hernandez in Spanish. As they spoke with the men, Miranda sent a text message to Cabbel and told her the men wanted the young women to go with them. Cabbel replied that she was looking at them, and it was okay for them to go. Miranda also testified that she called Cabbel and told her about the three men, and Cabbel "told me … not to trip, that they got our backs" in case anything happened. Miranda and Hernandez got into the van with the men.

Jacobo and Mendoza also testified about how they met Hernandez and Miranda.[6] As they left the bar with Gonzalez, they encountered two young women outside. One of the women approached and said she wanted to go out and drink beer with them. They talked for about five minutes, and then both women got into Jacobo's van with the three men. The young women sat in the back seat and Jacobo drove away from the bar.

Flores and Marie, who were still working in the parking lot, testified that about 10 to 15 minutes after the two young women arrived, the same two women returned to the parking lot and one woman was texting on a cell phone. A few minutes later, the three men from the green van also returned to the parking lot. One man approached and spoke with the woman who was not using the cell phone, and the other two men went to the van.

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[6] Jacobo and Mendoza positively identified Hernandez and Miranda from photographs as the two women they picked up at the bar.

Flores testified that after a few more minutes, the two men who were waiting by the van spoke to their companion in Spanish and said, " '[C]ome on, let's go.' " Their companion and the two young women walked to the green van, and everyone got inside and left.

Cabbel's car follows Jacobo's van

Hernandez testified she saw Cabbel's car near the bar's parking lot as they left, but she did not know if Cabbel followed the van from the bar. However, Miranda testified that as they left the bar in the van, she saw Cabbel's car following behind them. When the van turned at the corner, Miranda saw Cabbel's car take off in another direction. Miranda was upset and thought "[t]hey left us for dead."

Flores and Marie testified that as the van drove out of the parking lot, they saw the same light-colored vehicle that had earlier dropped off the two young women. The vehicle emerged from a parking spot on the street, the headlights were activated, and it drove directly behind the green van and followed it. The woman with blond hair was driving the vehicle. Flores could not see if anyone else was in the car.

Jacobo drives to Mendoza's apartment

Jacobo testified that as he drove from the bar, the two young women asked the men to buy particular brands of beer. Jacobo drove to a liquor store, but they did not buy anything. He drove to a second liquor store and they bought beer. Jacobo drove to the apartment where Mendoza and Gonzalez lived. Jacobo and Mendoza did not know if the women were using a cell phone while they were in the van's back seat.

Hernandez testified that when they got into the van, the men offered to buy drugs and alcohol for them. Miranda asked for Corona beer and Hernandez said she wanted Pacifico beer. The driver went to more than one liquor store, and the men bought Pacifico and Corona beers. Hernandez testified Miranda was texting on her cell phone during the drive. Miranda testified no one responded to her text messages.

Hernandez testified the driver parked at an apartment, and everyone went inside and drank beer. Miranda and Hernandez testified one man left the apartment, returned with drugs, and they smoked methamphetamine.[7] Hernandez testified everyone spoke in Spanish because the men did not speak English. However, Hernandez and Miranda spoke English to each other. Hernandez and Miranda testified the men made sexual advances to them, and they felt uncomfortable in their apartment.

Jacobo and Mendoza testified everyone was talking and drinking at the apartment. Jacobo and Mendoza noticed one of the young women was using a cell phone. The women said they wanted some drugs. Gonzalez and the women left, and they returned with drugs. Jacobo did not know what kind of drugs they were smoking.

Jacobo and Gonzalez drive to the alley

Jacobo and Mendoza testified that as the evening continued, one woman was on a cell phone, and then both women said they wanted to leave and mentioned something about a baby. One woman was crying. Jacobo and Gonzalez agreed to drive both women home. Mendoza did not go with them because it was very late, and he had too much to drink.

Jacobo testified he left the apartment with Gonzalez and both women. They got into Gonzalez's two-door car. Gonzalez was driving. Jacobo identified Hernandez as the woman who sat in the front passenger seat, and Miranda sat in the backseat with him. Jacobo testified the woman in the front seat (Hernandez) told Gonzalez where they wanted to go. He did not recall if either woman used a cell phone when they were in Gonzalez's car.

Hernandez testified that she asked to leave the men's apartment and said she had to go back to her child. Hernandez and Miranda left with two men; the third man did not

[7] Hernandez and Miranda testified the man who left to get the drugs was the man who was later killed in the alley, identified as Gonzalez.

go with them. They got into a different car, and one of the men (Gonzalez) drove. Hernandez sat in the front passenger seat, and Miranda and the other man (Jacobo) sat in the back seat. Miranda testified the man in the back seat made sexual advances toward her.

Hernandez testified Miranda used her cell phone while they were in the car. Hernandez testified Miranda spoke to her in English and gave her directions. Hernandez translated Miranda's directions into Spanish, and told the driver to go to the west side of Fresno, toward Food Maxx, and then directed him to turn into an alley near the store, based on Miranda's directions.

Miranda testified that when she was in the man's car, she spoke to Cabbel who told her to "go west" and "park by the Park." Miranda told Hernandez to have the men "drop us off at the west" and "park by the Park" because they were going back to Gutierrez's apartment.[8]

The attack in the alley

Hernandez and Miranda testified the driver parked in the alley. Hernandez was familiar with the alley because it was very close to Gutierrez's apartment. Hernandez did not see anyone else in the alley.

Jacobo testified Gonzalez drove into an alley and both women said, "[T]his is it." Gonzalez stopped the car, and the woman in the front passenger seat got out. Jacobo testified that Gonzalez got out of the driver's side door.

Hernandez testified the two men did not want them to leave. Hernandez and Miranda turned away from the car and started to walk toward Gutierrez's apartment.

Jacobo testified that as he got out of the back seat, a man was "already there and [he] grabbed me by my hand" and pulled him out of the car. The man spoke Spanish and

[8] There was a park adjacent to the alley that was near Gutierrez's apartment.

told Jacobo that he wanted his wallet. Jacobo told the man to wait for a little bit until he took out his wallet. Jacobo testified he was very drunk and had trouble reaching for his wallet. He tried to "loosen" himself from the man.

Jacobo realized a second man was standing by Gonzalez. Both suspects were Hispanic. Jacobo did not know where the men came from, and he did not notice what happened to the young women. The second suspect hit Gonzalez in the head. The first suspect attacked Jacobo. Jacobo tried to kick him, but he was too drunk to defend himself. The first suspect stabbed Jacobo with a knife. Jacobo fainted, he never heard a gunshot, and he did not see what the second suspect did to Gonzalez.

Hernandez testified she was walking away from the car when she heard Sanchez say, " 'Give me the money' " in Spanish. Hernandez turned around and looked back at Gonzalez's car. She saw Sanchez and Guerrero struggling with the two men. Hernandez testified Guerrero had a gun. Hernandez heard the victims say "no," and they refused to turn over their money.

Hernandez testified Guerrero and Sanchez told the young women to run. Hernandez and Miranda started to run toward Gutierrez's nearby apartment. Hernandez heard a gunshot. Hernandez turned around and looked back at the car. She saw Guerrero hit one man in the back of the neck, above the shoulders, and the man "just dropped" down. This man was later identified as Gonzalez. Guerrero pointed the gun at something, possibly the man he hit in the back.

Miranda testified she got out of the car, told Hernandez they were leaving, and started to walk out of the alley toward Gutierrez's apartment. She saw Sanchez in the alley with the man who had been sitting in the backseat with her, later identified as Jacobo. The man was on his knees. Sanchez told the man to turn over his wallet and everything he had. The man seemed to be reaching for his wallet, and Sanchez kicked him more than once.

Miranda turned away from the car. She heard a gunshot, turned around, and saw the driver (Gonzalez) on the ground. Miranda initially testified she did not see the face of the second suspect, but he was wearing the same sweater which Guerrero had been wearing. However, Miranda eventually testified that Guerrero was in the alley, he was standing by the driver, and he hit the driver with something. Sanchez told her to run. She grabbed Hernandez's hand, and they ran to Gutierrez's apartment. Hernandez fell down and scraped her arm and knee, and then she got up and kept running.

Miranda and Hernandez return to Gutierrez's apartment

Hernandez testified that when they got back to Gutierrez's apartment, she did not see anyone, and the party guests were gone. Hernandez went into the bedroom and checked on her child. Miranda stayed outside the apartment. Hernandez changed her clothes because she got dirty when she fell down.

Miranda testified she saw Cabbel outside Gutierrez's apartment. Miranda went inside, and Gutierrez and Guerrero were there. Sanchez was in the kitchen and washing blood off his hands. Miranda cursed Sanchez and Guerrero, and told them they were stupid. She was mad because "everything happened so fast and … they never told us they were going to use a gun or stuff like that." Gutierrez later told her to be quiet about everything and keep him out of it.

Miranda went outside and saw the victim's car in the carport. About an hour later, Miranda saw Gutierrez drive away in the victim's car.

Gutierrez's testimony about after the shooting

Gutierrez testified that he was in his girlfriend's upstairs apartment when he heard "a big commotion outside, like arguing." He ran outside and it was still dark. Gutierrez testified Miranda and Sanchez were in the carport. Miranda was arguing and cursing Sanchez, and kept asking him in Spanish, "Why? Why?" Guerrero and Hernandez were running from the alley to Gutierrez's apartment.

Gutierrez testified there was a small car in the carport, near where Miranda and Sanchez were arguing. Gutierrez testified he did not recognize the car, and it had not been there during his party. The driver's door was open, and he could not see anyone inside it. Gutierrez thought it was probably a stolen car. This car was later identified as Gonzalez's vehicle, which had been parked in the alley during the robbery and murder.

Gutierrez returned to his apartment and there were still two or three people there from his party. Hernandez and Miranda ran inside and were "just going all hysterical and crazy." He tried to ask what happened, but they did not respond. Everyone was "just like tripping out." Sanchez ran into the bathroom, Guerrero went into a bedroom, and the young women were crying in the living room. Gutierrez again asked the young women what happened, but things were "all crazy" and they didn't explain.

Gutierrez testified Sanchez emerged from the bathroom and said "something had happened," and he was going to leave. Gutierrez kept asking Sanchez what happened. Sanchez said he would tell him later.

Gutierrez testified the young women went into their bedroom, and he heard "banging" and things being thrown around. When they walked out of the bedroom, they had changed their clothes. Gutierrez thought that he had seen a dark red stain on one young woman's skirt before they changed.

Gutierrez went to the bedroom to speak to Guerrero, who was taking off his shirt and black sweater. Guerrero looked "very pissed," and Gutierrez decided to leave him alone.

Gutierrez went back to Sanchez and asked what happened. Sanchez was changing his clothes. He said in Spanish, "that they had did this hit and that they had hit this—he said—he said 'pisa' at the time, so he said that—that it was an accident." Gutierrez testified the word "pisa" meant "Mexican." Gutierrez again asked Sanchez what

happened. Sanchez "wasn't really telling me like a lot of things." Sanchez was putting clothes in a bag and said he was leaving.

Gutierrez went upstairs to his girlfriend's apartment and talked to her about the situation. His girlfriend said he had to find out whether the car was stolen and get rid of it.

Gutierrez returned to his apartment. A few party guests were still there, but Guerrero, Sanchez, and one of the young women were gone.

Gutierrez moves the victim's car

Gutierrez testified that around sunrise, he went to the carport and moved the car that he believed was stolen. The driver's door was still open and the interior light was on. The ashtrays were pulled out, the glove compartment was open, and the center console was flipped open. The stereo had been pulled out and wires were dangling. There were insurance documents and other papers spread inside and outside the car. Gutierrez picked up some of the papers and threw them into his nearby trash can. Gutierrez thought the keys were in the car because he tried to start it, but the battery was dead. Gutierrez shifted the car into neutral, pushed it to Modoc Street, and left it there. He spent the rest of the night at his girlfriend's apartment.

THE INVESTIGATION

Jacobo testified that he woke up in the alley, and realized he had been stabbed and he was bleeding. Gonzalez was lying on the ground next to him. Jacobo tried to talk to him, but Gonzalez was not responsive. Jacobo walked out of the alley and onto the street to find help.

At 3:33 a.m. on June 6, 2010, Sergeant Richard Brown received a dispatch about a suspicious person in the area of Stanislaus and B Streets. At 3:36 a.m., Sergeant Brown arrived in the area and found Jacobo walking in the street. Jacobo had several stab wounds, and his clothes were soaked in blood. Jacobo told Sergeant Brown that he and

his friend had been assaulted in the area. Jacobo's wallet, and the money and papers inside it, were not taken from him during the assault in the alley.

Sergeant Brown looked in the vicinity for Jacobo's friend. The police received information about a subject lying in a nearby alley, about four blocks from the location where Jacobo had been found. Brown responded to the alley and found Juan Gonzalez lying face up on the ground. He was dead from a gunshot wound to the head. The police did not see a vehicle in the alley.

Jacobo suffered multiple stab wounds to the left side of his chest, waist, left arm and hand. He was in the hospital for one week and survived his injuries. He returned to the hospital several times for additional operations. He had nerve damage to his left arm and permanent injury to his left hand.

The pathologist determined Gonzalez had been shot in the back of his head, and he died within several minutes. There were no signs of stippling or gunpowder around the entrance wound, which indicated the gun barrel was not directly on his skin. There was no evidence the fatal wound was inflicted by a shotgun. Gonzalez also had abrasions on his left cheek below the eye and on the left forehead, which showed a particular pattern from whatever was used to inflict the injuries. The facial injuries were inflicted around the same time as the fatal head wound. There were no defensive wounds. Gonzalez's blood and urine tested positive for alcohol, methamphetamine, and amphetamine.

The crime scene

At 6:00 a.m., Detective Jennifer Federico arrived in the dirt alley where Gonzalez's body was found. Both entrances to the alley were blocked with crime scene tape. A wallet was lying on the ground, about a foot and a half away from Gonzalez's body. There was no money in the wallet.

There was a nine-millimeter Lugar expended cartridge case on the ground, about a foot from Gonzalez's body. There were fresh shoe tracks and bloody shoe prints in the

dirt. A Corona beer bottle and a broken bottle of Pacifico beer were in the vicinity of the body.

There was a trail of blood drops that led from the alley, into the street, and along the fence at the park which was adjacent to the alley. The blood trail ended on the street where Jacobo was found.

The victim's apartment

The investigating officers went to Gonzalez's apartment and found empty beer cans and bottles throughout the interior, including those for Pacifico, Corona, and Tecate. A homemade device used to smoke methamphetamine was on the couch. Jacobo's green van was parked near Gonzalez's apartment complex. There were empty Tecate beer cans and Corona beer bottle caps inside in the van.

Gutierrez and the Nike shoes

Around 9:00 a.m., as the officers investigated the alley where Gonzalez's body was found, Gutierrez testified he left his girlfriend's apartment and went downstairs to his own apartment. He grabbed his wallet because he was going to the store. He looked inside one of the bedrooms and one of the young women was asleep. No one else was there.

Gutierrez testified he had been wearing some "nice dress shoes" at the party. He also testified that when he returned to his apartment around 9:00 a.m., he was wearing "some brown Lugz" shoes.

Gutierrez testified he owned three or four pairs of shoes, including a pair of white Nike Air Jordans, which did not have laces. He had last worn the Nike shoes two days before the party. Gutierrez testified that when Guerrero moved into his apartment, he

allowed Guerrero to borrow his shirts, socks, and shoes because Guerrero did not have any money or clothes to wear.[9]

Gutierrez testified that as he left for the store, he took off his "slippers" and put on the Nike shoes, which he had left outside the front door next to the doorstep. He had left the shoes at the door because he used them "for yard clean up, like yard shoes." He did not notice anything unusual about the Nikes or see any blood on the shoes. However, Gutierrez subsequently admitted that he noticed stains on the shoes and tried to wash them off with a hose.

After he put on the Nike shoes, Gutierrez and his girlfriend walked to the store. He bought "a Smirnoff" and some chips and candy.

Discovery of the victim's car

At 1:00 p.m., the investigating officers found Gonzalez's silver two-door Mercury Cougar on Modoc Street near East Amador. The car was about two blocks from the alley where Gonzalez's body was found, and where he had parked the car to drop off the young women. The stereo was missing and the wires were hanging from the dashboard. However, the car's interior was unusually clean, as if it had just been cleaned out.

It was later determined that Miranda's right palm print was on the car's exterior, on the rear roof of the driver's side.

Initial contact with Gutierrez

After they found the victim's car, Detective Federico and other officers walked around the neighborhood, looked through trash containers, and hoped to find something connected to the vehicle. They ended up at Gutierrez's apartment complex on East Amador, which was less than 100 yards away from the location of the victim's car.

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[9] As we will explain below, Gutierrez was interviewed during the investigation and repeatedly told the police that the white Nike shoes did not belong to him. He eventually admitted the shoes belonged to him, he saw the bloodstain, and he tried to wash off the blood with a hose.

Detective Federico looked around the outside of the apartment and carport area. There were beer bottles, chairs, and a barbeque grill in the carport, as if there had been a party. Federico looked in the grill and did not see anything unusual.[10] Federico noticed the beer bottles were the same brand as those in the alley where the victim's body was found.

As the officers looked around the outside of the apartment complex, Gutierrez and his girlfriend returned from the store. Gutierrez was carrying an open container of vodka. He was wearing a black T-shirt, white shorts, and black and white shoes without laces.

Detective Federico questioned Gutierrez about the open container. Gutierrez also had a small amount of marijuana. Federico asked if he had a party the previous night. Gutierrez acted nervous. He was vague and hesitated to give any information. He said he had a gathering and spent the night at his girlfriend's apartment. Gutierrez said he lived by himself in his apartment.

Detective Federico asked Gutierrez to sit down, and she noticed the chevrons on the soles of his Nike shoes were similar to the shoe prints in the dirt alley near the victim's body. Another detective noticed possible blood stains on top of the shoes.[11]

Detective Federico determined Gutierrez had outstanding misdemeanor warrants. He was taken downtown because of the warrants and for an interview. During the interview, Gutierrez admitted he had a party but gave false names for his friends. Gutierrez again said he lived alone. Gutierrez was asked if he saw anything unusual in

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[10] Gutierrez testified that a few hours later, Guerrero returned to his apartment and tried to burn his black sweater in the barbeque. The police later found the charred remains of the clothes in the grill.

[11] It was stipulated that based on DNA testing, the police later learned that Gonzalez's blood was found on the outside of one of the Nike shoes that Gutierrez was wearing that morning, and Gutierrez's DNA was on the inner tongue of both shoes. There was no further evidence introduced about the similarities between the shoe prints in the alley and the chevrons on Gutierrez's shoes.

the middle of the night. He said there were two guys driving in the alley around 3:00 a.m.[12]

Detective Federico testified that at the time of this interview, she did not know if there was blood on Gutierrez's shoes or who it matched. However, she went by her "gut instinct" and told Gutierrez that the victim's blood was on his shoes. Gutierrez said he had cleaned off the shoes that morning.

After the interview, Gutierrez was taken to jail, and then cited and released. The police seized the white Nike shoes.

Guerrero and Sanchez leave Gutierrez's apartment

Gutierrez testified that that after he was cited and released, he returned to his apartment and no one was there. Later that afternoon, however, Guerrero reappeared at the apartment. Gutierrez asked him what happened. "[Guerrero] told me that he was sorry" and "he didn't meant to do it," and then "got to telling what went on."

Gutierrez testified he "blew up," cursed Guerrero, and asked "why you guys do that for … I live right here, you know, I – I helped you guys, you know, and for you guys to do this shit to me, you know, and I thought you guys were my homeboys …." Guerrero said he was sorry and "he didn't mean to – it wasn't supposed to happen," and "he started fighting."

Gutierrez testified that he saw Guerrero using his barbeque grill, which had been moved to the back patio. Guerrero was burning a sweater on the grill. Guerrero did not explain what he was doing and Gutierrez did not ask, but he "kind of figured" why he was doing it. Gutierrez testified Guerrero later left the apartment. Gutierrez looked in

[12] At trial, Gutierrez testified he lied about everything when he initially spoke to the police because he figured something had happened, and he wanted to protect his friends.

Guerrero's bedroom and all of the clothes were gone, including those that Gutierrez had loaned to him.

Rosalina Gonzalez, Gutierrez's neighbor, testified that on Saturday night, June 5, 2010, she heard gunshots. On Sunday afternoon, June 6, 2010, she saw the police walk around Gutierrez's apartment, take photographs, and collect bottles and cans. After the police left, she saw Sanchez walk out of the apartment complex's front gate. He was carrying a bag of clothes. Shortly afterwards, Guerrero walked out of the same gate and also had a bag of clothes. She asked Guerrero if he was going to do the laundry. Guerrero replied, " 'No, I'm leaving.' " He got into a car and left with some young women.

Search of Gutierrez's apartment

On or about June 7, 2010, the officers executed a search warrant at Gutierrez's apartment. They found men's and women's clothes, baby items, photographs of Hernandez and another young woman, and paperwork in the names of Hernandez, Miranda, Guerrero, and Gutierrez. They also found clothes that appeared to have blood on it.[13]

The registration paperwork for Gonzalez's car was found in a hallway closet. The officers also found a sawed-off shotgun in the patio area, and .22-caliber shells in the apartment.[14] There were several knives in the kitchen and one knife in a bedroom. There was no evidence of blood on the knives.

The officers examined the barbeque grill on the back patio. They found ashes from burnt clothing in the grill. The ashes were not present when they initially saw the grill in the carport area the previous day.

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[13] The clothes were seized, but there was no forensic evidence of blood.

[14] Gutierrez was arrested and taken into custody for possession of the sawed-off shotgun found on his patio. The charge was later dismissed, and he was not charged with any offenses in this case.

Gutierrez's subsequent statements

After the search, Gutierrez was arrested for possession of an illegal weapon. Gutierrez was again interviewed and confronted with the discovery of the shotgun, clothes that appeared bloody, and the victim's vehicle registration. Gutierrez was told the evidence pointed to him. Gutierrez said he got into a fight in the alley with someone and cleaned up in the bathroom.

Gutierrez later said something happened that night, he was upset about it, and he pushed a car away because the keys were missing. Gutierrez also said someone moved the car to East Modoc in the middle of the night. Gutierrez said two people named "Mousie" and "Pelon" had been staying at his apartment, they were gone in the morning, and he had not seen them since. Gutierrez said the Nike shoes did not belong to him, they had been "left" at his apartment, and he found them outside the front door.

Gutierrez eventually told the officers that "Mousie" Guerrero, "Pelon" Sanchez, Hernandez, and Miranda were at his apartment that night, they left together, and they later returned. Gutierrez also said the Nike shoes belonged to him. He noticed there was blood on the shoes, and he cleaned the blood off the shoes with a water hose because he did not want people to see him walking around with bloody shoes. He did not know they were involved in that kind of serious offense, and he did not want anyone else to get in trouble. Gutierrez said he initially did not want to identify anyone because of his lifestyle, and he did not want to be a snitch. Gutierrez said he was not involved in killing anyone, and he was upset that everything got put on him.

Miranda's pretrial statements

On June 11, 2010, Miranda was interviewed at the police department. Detective Federico asked Miranda what "you guys decided to do." Miranda replied that "they told us … to go and 'hila' – that means a job in Spanish – 'some guys.' " Miranda said they were supposed to "[g]o dance with some guys … like go kick it with them, and whatever,

you know, and hit 'em up … when they were right there." Miranda was asked if they " 'were going to jack 'em?' " Miranda replied, "I guess." Miranda also said, "[T]hey just want us to talk to some guys and, you know, to bring 'em right out there and whatever …" and "like to steal." Miranda thought they were just going to "beat up the guys for money."

Miranda said that when they got into the green van, she was texting with Cabbel and "they said, 'yeh, we're following you, you know, we're behind you.' " Miranda lost sight of Cabbel's car and again texted her, but did not receive a response.

Miranda was asked about whether she was texting when the men drove them from the apartment to the alley. Miranda said she received a text for the men to drive to the west side by the park: "Clumsy [Cabbel] told her Mousie [Guerrero] told her that we're going back to the West." Miranda also said that Sanchez sent her a text with driving instructions.

Miranda said when they arrived in the alley, she got out of the car and saw Guerrero and Sanchez. Guerrero went directly to the driver (Gonzalez) and Sanchez walked up to the passenger (Jacobo). Either one or both men told Miranda and Hernandez to run. Guerrero hit the driver with a gun in the back of the neck. She said the weapon was a faded black color, and it was possibly a .40-caliber gun. Miranda heard a gunshot and the driver went down.

On June 14, 2010, Miranda was again interviewed. She said that she was in the bar's parking lot with Hernandez, and they were picked up by three Hispanic men. They got into the van, and she sent a text message to Cabbel to let her know they were in the van. Miranda said Cabbel sent her a text message that she knew where they were, and "they were watching them." Miranda said she did not see where Cabbel was parked. Miranda was asked how she knew Cabbel was texting her. Miranda said she was not sure who was texting her, but she knew the source was either Cabbel, Guerrero, or Sanchez.

However, Miranda thought Sanchez was the only person who had a cell phone. Miranda said that around 2:30 a.m., she received a text message from Sanchez that directed her to bring the victims west to the park.

Hernandez's pretrial statement

On June 13, 2010, Hernandez was arrested. The police noticed she had scabs on her arm and knee.[15] Hernandez said she went to a bar with another woman to "sweet talk" some men. They gave false names to some of the men they met. She said the men took her to an alley and the suspects were there. Hernandez said she did not know who the suspects were, and she did not implicate anyone.[16]

Hernandez asked Detective Federico what kind of charges she faced. Federico replied that she could face the death penalty. Hernandez was surprised that it was serious. Federico gave Hernandez her business card and encouraged her to call her with any information. Hernandez was booked into jail after the interview.

On June 14, 2010, Hernandez called Detective Federico from jail and agreed to another interview. Hernandez was shown photographs and identified Cabbel, Guerrero, Sanchez, and Gutierrez as people who may have been involved. However, she did not say that Gutierrez was involved in any way in the homicide. She gave a false name for Miranda. Hernandez said she did not see the faces of the suspects in the alley, but she thought the men were Guerrero and Sanchez.

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[15] Hernandez testified that as she ran from the alley, she fell down and scraped her arm and knee.

[16] At trial, Hernandez testified she lied during her initial interviews about her friends and what happened that night because she was scared, she did not want to identify Guerrero and Sanchez, and she did not want to be a snitch.

The other suspects

On June 18, 2010, Cabbel was arrested. She had brown hair with blond streaks.[17] Cabbel disclosed the cell phone numbers for herself and her boyfriend, and what she thought was his home telephone number.[18]

On June 19, 2010, Guerrero was arrested in Washington state. His head was shaved and he had tattoos in cursive writing on both sides of his neck, which were clearly visible.

Sanchez was never found.

Forensic evidence

As noted above, it was stipulated that, based on DNA testing, the police later learned that Gonzalez's blood was found on the outside of one of the Nike shoes that Gutierrez was wearing that morning, and Gutierrez's DNA was on the inner tongue of both shoes.

The cell phone records

As explained above, Sergeant Brown received a dispatch at 3:33 a.m. on June 6, 2010, about a suspicious person in the area of Stanislaus and B Streets. At 3:36 a.m., Sergeant Brown arrived in the area and found Jacobo, who was critically wounded and reported the attack. A short time later, Brown found Gonzalez's body in the alley.

The prosecution introduced the records from Gonzalez's cell phone, which showed that numerous calls were place to and from his cell phone starting at 3:11 a.m. on June 6, 2010, and continuing to June 7, 2010. There were calls from Gonzalez's cell phone to Cabbel's cell phone at 3:11 a.m., 3:26 a.m., 3:31 a.m. and 3:32 a.m. There were

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[17] Flores and his girlfriend, who were working in the bar's parking lot, testified the two young women arrived in a car driven by a light-skinned woman with blond hair.

[18] There is no evidence that Cabbel's boyfriend was involved in the conspiracy, but Gonzalez's cell phone was used to call the boyfriend's telephone numbers after the murder.

calls from Gonzalez's cell phone to the cell phone of Cabbel's boyfriend at 3:36 a.m., 3:38 a.m., and 4:16 a.m. There were six calls from the cell phone of Cabbel's boyfriend to Gonzalez's cell phone between 4:04 a.m. and 5:32 a.m., and another at 8:20 a.m. At 9:11 a.m., there was a call from Gonzalez's cell phone to a number that was similar to the number which Cabbel thought was her boyfriend's home number.[19]

GUERRERO'S DEFENSE EVIDENCE

Neither Guerrero nor Cabbel testified at trial.

Guerrero presented evidence from Gary Harmor, a forensic seriologist, who examined the Nike shoes which Gutierrez was wearing. There was DNA on the inner tongue portion of both shoes from two or more people. He determined Gutierrez was the major contributor to the DNA profile. Guerrero was absolutely excluded as a source. Harmor testified a person's DNA will remain in shoes which that person wore until the shoes are thoroughly washed. If the outside of the shoes had been washed with a hose, the DNA would slightly degrade but still remain.

There were at least two and maybe more DNA profiles on the inside of the right shoe's tongue; and at least three and maybe more DNA profiles on the inside of the left shoe's inner tongue.

If a person wore clean socks and then put on the shoes, that person's DNA would not have transferred to the shoes as long as the socks were not soaked with perspiration. Harmor believed that a person would leave DNA even if that person wore socks and shoes in the summer since perspiration would happen fairly quickly.

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[19] Detective Federico testified that when Cabbel was arrested, she stated her cell phone number was 559-408-0117, and her boyfriend's cell phone number was 775-351-8520. She was not sure about her boyfriend's home telephone number, and thought it was 775-747-2547. Gonzalez's cell phone records show that at 9:11 a.m., a call was made to 775-747-*5247*.

There was mold on the shoes when they were delivered to Harmor's laboratory. The mold was consistent with moisture, and DNA will degrade as a result of prolonged contact with moisture.

PROCEDURAL HISTORY

Guerrero and Cabbel were charged with count I, conspiracy to commit robbery; count II, first degree murder of Gonzalez, with the robbery felony-murder special circumstance; count III, attempted premeditated murder of Jacobo; count IV, second degree robbery of Gonzalez (§ 211); and count V, attempted second degree robbery of Jacobo (§§ 664/211).[20]

As to counts II and IV, murder and robbery of Gonzalez, it was alleged Guerrero personally discharged a firearm causing death (§ 12022.53, subd. (d)) and personally used a firearm (§ 12022.5, subd. (a)); and as to Cabbel, that a principal was armed with a firearm (§ 12022, subd. (a)(1)). It was further alleged Guerrero had one prior serious or violent felony conviction, one prior strike conviction, and served three prior prison terms.

The verdicts and sentences

On November 16, 2012, the joint jury trial began for Guerrero and Cabbel.

On December 7, 2012, defendants were convicted on all substantive counts, and the special circumstances were found true. The jury found all firearm allegations true as to Cabbel.

As to Guerrero, the jury found that as to counts II and IV, the murder and robbery of Gonzalez, he personally used a firearm but he did not personally and intentionally discharge a firearm that proximately caused the victim's death.[21]

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[20] Gonzalez's wallet was found next to his body, but it was empty. Jacobo's wallet was not taken from him.

[21] As to counts II and IV, first degree murder and robbery of Gonzalez, the jury found true the special allegation that Guerrero personally used a firearm, but found not true the additional allegation that he personally and intentionally discharge a firearm that

The court found Guerrero's prior conviction allegations true.

Guerrero was sentenced to life without the possibility of parole for count II, first degree murder of Gonzalez with the special circumstance; life with the possibility of parole for count III, attempted premeditated murder of Jacobo; plus 22 years for the firearm and prior conviction enhancements; and the terms and enhancements imposed for counts I, IV, and V were stayed pursuant to section 654.

Cabbel was also sentenced to life without the possibility of parole for count II, first degree murder of Gonzalez with the special circumstance, plus one year for the enhancement of a principal being armed with a firearm; a consecutive term of life with the possibility of parole for count III, attempted murder of Jacobo; a concurrent term of two years for count V, attempted robbery of Jacobo; with the remaining terms and enhancements stayed.

DISCUSSION

I. Admission of Gonzalez's Cell Phone Records

There was extensive testimony from Flores, Hernandez, Jacobo, and Mendoza about how Miranda was texting on her cell phone that night, and Miranda testified she was communicating with Cabbel. However, the prosecution never introduced the cell phone records for either Cabbel or Miranda.

Instead, the prosecution introduced records from Gonzalez's cell phone, which showed that his cell phone was used to call the cell phone numbers of Cabbel and her boyfriend shortly after the police found Gonzalez's body in the alley. The prosecutor relied on these records and argued the inference could be made that Guerrero and/or Sanchez took the cell phone from Gonzalez during the robbery, gave it to Cabbel as payment for her participation, and she used it to call her boyfriend after the crime.

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proximately caused the victim's death. Cabbel speculates the jury's finding on the personal discharge allegation indicates that it found the gun accidentally discharged when Guerrero hit Gonzalez in the face.

Cabbel's attorney conceded the cell phone records were admissible as business records. However, both defense attorneys objected to the prosecution's motion to have Detective Federico testify and interpret the cell phone records for the jury, and argued her proposed testimony would be hearsay and the records were irrelevant in the absence of any expert testimony explaining the contents. The court agreed that Detective Federico could not testify about the contents of the records, but held Gonzalez's cell phone records were otherwise admissible as business records, and they were relevant and self-explanatory.

On appeal, Cabbel argues the court should have excluded Gonzalez's cell phone records because the prosecution failed to introduce a legally sufficient declaration from the custodian of records, the documents were never authenticated, and the business records exception to the hearsay rule was not satisfied.

Cabbel concedes her attorney failed to raise these issues and never challenged the custodian's declaration or the authenticity of the cell phone records. We find counsel's failure to raise these evidentiary objections has forfeited review of the issue. (*People v. Dykes* (2009) 46 Cal.4th 731, 756–757.) In the alternative, Cabbel asserts her defense attorney was prejudicially ineffective for failing to make these challenges. Guerrero joins in the argument to the extent applicable to his case.

"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214–215.)

A. <u>Admissibility of Business Records</u>

We begin with the admissibility of business records as an exception to the hearsay rule. Evidence Code section 1271 provides that "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule" if it meets all of the following requirements: (1) the writing was made in the regular course of a business; (2) it was made at or near the time of the act, condition, or event; (3) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation were such as to indicate its trustworthiness. (Evid. Code, § 1271.)

" ' "Whether a particular business record is admissible as an exception to the hearsay rule ... depends upon the 'trustworthiness' of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record. [Citations.]" ' [Citation.] 'The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.' [Citation.]" (*People v. Zavala* (2013) 216 Cal.App.4th 242, 246 (*Zavala*).)

Computer printouts are admissible "when they fit within a hearsay exception as business records [citation] or official records [citation.]" (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1448–1449.) "[A] printed compilation of call data produced by human query for use at trial falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business." (*Zavala*, *supra*, 216 Cal.App.4th at p. 248.)

"A trial judge is vested with wide discretion in determining whether a proper foundation has been laid for admission of business records under the business records exception. [Citation.] 'Where the trial court has determined that the foundation laid was sufficient to support the introduction of evidence under the business records exception,

and the record reasonably supports this determination, its conclusion is binding on the appellate court.' [Citation.] Determining whether a proper foundation has been laid for the admission of business records under Evidence Code section 1271 is within the trial court's discretion and 'will not be disturbed on appeal absent a showing of abuse.' [Citation.]" (*Zavala, supra*, 216 Cal.App.4th at pp. 245–246.)

With these principles in mind, we turn to the evidence introduced in this case.

B. The Prosecution's Motion to Introduce the Records

Detective Federico, the lead investigator in the case, testified on direct examination that she used an emergency court order to obtain the records for Juan Gonzalez's cell phone, and identified his cell phone number. The prosecution moved to introduce these records into evidence. Both defense attorneys objected to the prosecution's motion to introduce those records. The court excused the jury, reviewed the proffered exhibits, and conducted a lengthy hearing on the admissibility of the records.

C. The Subpoena

At the hearing on the evidence motion, the prosecution submitted the following documentary exhibits to the court. On July 2, 2012, the district attorney's office served a subpoena duces tecum on "The Custodian of Records—AT&T," to provide "any and all subscriber information" for Gonzalez's cell phone number, and asked for "any and all communications for said number from 6/5/10 through 6/7/10," and "any and all Call Detail records for said number." The recipient was directed to deliver all the items to the court within five days of service, along with "your completed Declaration of Custodian of Records."

The prosecutor's declaration filed in support of the subpoena stated that Gonzalez's cell phone was not found on his body but it was used to place calls after his death.

D. The Declaration

In response to the subpoena, AT&T served a series of documents on the court. These documents were accompanied by a "Declaration of Authenticity of AT&T Records" executed on July 6, 2012 by Myra Wherry, an AT&T employee. Ms. Wherry's declaration stated:

> "I am over the age of 18 and qualified to process this affidavit. I am employed by AT&T as an Accounting Clerk and also serve as the Custodian of Records for AT&T. I have been employed by AT&T since 9/7/76. Attached to this Declaration are true and correct copies of subscriber information and/or call detail issued by AT&T for the following accounts."

The declaration stated the records were for the requested cell phone number (Gonzalez's number), for the period of June 5 through June 7, 2010. It continued: "Pursuant to 28 U.S.C. Sec. 1746, I declare, under penalty of perjury, that the foregoing is true and correct."[22]

E. The Cell Phone Records

The documents submitted by custodian, and attached to her declaration, consist of several computer-generated pages. The first document is entitled "Subscriber Information" and states it was generated on July 6, 2012. It contains Gonzalez's name and address, and identifies him as the financially liable and billing party; his cell phone and account numbers; the specific dates the cell phone was active; and that there was a "status change" on July 6, 2010, because the customer was deceased.

The next document is entitled "Mobility Usage." It is a six-page computer-generated spreadsheet. At the top of each page, it states the "run date and time," which was on July 6, 2012; and the cell phone and account numbers identified for Gonzalez in the "Subscriber Information." On each page, there are ten columns with titles, including

[22] Title 28 United States Code section 1746 states an affiant's unsworn declaration filed under penalty of perjury must assert the document is "true and correct."

"Conn. Date," "Conn. Time," "Originating Number," and "Terminating Number," with multiple lines of data across the spreadsheet under each column heading.

The AT&T corporate symbol is printed at the top of the "Subscriber Information" and every page of the "Mobility Usage." The following sentence is at the bottom of every page: "AT&T Proprietary [¶] The information contained here is for use by authorized person only and is not for general distribution."

Also included is a document entitled "Legend for AT&T Mobility Records," which states: "Please refer to the legend below that explains the columns and the information displayed on the attached report." This document identifies and extensively explains the column headings and abbreviations in the "Mobility Usage" spreadsheet. For example, "Conn. Date and Conn. Time" means "[t]he date and time the call was actually connected." It also explains that if the "target number appears" in the "Originating Number" field, "the call is an outgoing call and the called number is in the Terminating Number field." If the target number appears in the "Terminating Number" field, "the call is an incoming call and the caller's number is in the Originating Number field."

F. <u>Calls Made from Gonzalez's Cell Phone</u>

As explained in the factual statement above, Sergeant Brown received a dispatch at 3:33 a.m. on June 6, 2010, about a suspicious person in the area of Stanislaus and B Streets. At 3:36 a.m., Brown arrived in the area and found Jacobo, who was critically wounded and reported the attack. A short time later, Brown found Gonzalez's body in the alley.

Detective Federico testified about the cell phone numbers which Cabbel disclosed upon her arrest, including those for Cabbel, her boyfriend, and what she thought was her boyfriend's home telephone number.

The cell phone records submitted by AT&T's custodian show there were numerous calls placed from and to Gonzalez's cell phone starting at 3:11 a.m. on June 6, 2010, and continuing to June 7, 2010. Several of the calls on June 6, 2010, near the time that Gonzalez's body was found, were to and from numbers associated with Cabbel. There were calls from Gonzalez's cell phone to Cabbel's cell phone at 3:11 a.m., 3:26 a.m., 3:31 a.m. and 3:32 a.m. There were calls from Gonzalez's cell phone to the cell phone of Cabbel's boyfriend at 3:36 a.m., 3:38 a.m., and 4:16 a.m. There were six calls from the cell phone of Cabbel's boyfriend to Gonzalez's cell phone between 4:04 a.m. and 5:32 a.m., and another at 8:20 a.m. At 9:11 a.m., there was a call from Gonzalez's cell phone to a number which was similar to the number which Cabbel thought was her boyfriend's home number.

G. <u>The Court's Hearing on the Records</u>

At the hearing on the admissibility of the Gonzalez's cell phone records, the prosecutor argued the documents were admissible under the business records exception to the hearsay rule because Gonzalez's cell phone records were subpoenaed pursuant to a subpoena duces tecum "directly to the court. They came down here from the exhibit clerk. They are cell phone records from Mr. Gonzalez. There is an attached declaration of authenticity of records from the custodian."

The prosecutor argued the records were self-explanatory because they listed "the date, time, originating number, terminating number, the time of the call, the number dialed." The records were relevant to show "the deceased's phone being used subsequent to his death." The records did not contain cell tower location data, but Detective Federico would testify that Gonzalez's cell phone was used to call numbers which belonged to Cabbel and her boyfriend.

Cabbel's defense attorney conceded that the records were admissible under the business records exception to the hearsay rule, and he did not object to the custodian's declaration or raise any authentication issues.

However, Cabbel's attorney argued Detective Federico could not "read from that document the cell phone numbers and make that connection. That is hearsay, period." Cabbel's attorney argued the prosecution had not called any expert witness who could testify "what the phone numbers mean or who called who or when it was called," and it would be speculative for a lay witness to testify that a certain person used that cell phone and made those calls.

The court asked the defense attorneys whether they would object to the prosecutor relying on the cell phone records and other evidence in closing argument to explain that the victim's cell phone was used to call the defendant's cell phone. Cabbel's attorney said that while the records were admissible as business records, they were otherwise irrelevant in the absence of an expert testimony to interpret their contents or explain "who's phone called who at what time." Cabbel's attorney clarified:

> "*I'm not objecting to the admissibility of the cell phone records because of the – the certification of business records*. However, they're irrelevant to this case *unless somebody can get on the witness stand and lay a foundation about who's phone called who at what time*. And I think it requires more than somebody reading from a – a cell phone record. That's hearsay. I don't care if it's admitted, it's still hearsay, so it's not admissible." (Italics added.)

Guerrero's defense counsel argued there might be a confrontation clause violation because "we don't have somebody testifying as to the accuracy of its contents."[23]

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[23] A confrontation clause issue can arise for the introduction of business records "if the regularly conducted business activity is the production of evidence for use at trial." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321.) However, cell phone records produced by a carrier in response to a subpoena are not testimonial, because the carrier's regularly-conducted business activity is not the production of

The prosecutor replied the cell phone records were self-explanatory, expert testimony was unnecessary, and there were no confrontation clause issues because cell phone records are not otherwise generated in anticipation of litigation.

H. <u>The Court's Ruling</u>

The court held the records for Gonzalez's cell phone were admissible as business records, and relevant to establish that Gonzalez's cell phone was used to place calls to the cell phones of Cabbel and her boyfriend shortly after his body was found. The court decided the records were admissible in the absence of expert testimony about the contents, based on the extensive explanations provided in the "Legend" for the spreadsheet's abbreviations and column headings. "[I]t sure seems as if you don't even need anyone to interpret what the columns mean.… I've never seen this table in the records.… This is the first time I've seen such a table. So for me, it alleviates the concern for the detective having to interpret anything."

The court held that if Detective Federico testified about the cell phone numbers disclosed by Cabbel, and those numbers are contained in the spreadsheet, then Gonzalez's cell phone records were "sufficient enough to explain to the trier of fact what's contained in these tables, the number." The court was concerned about whether the SIM card could have been removed and placed in another cell phone, but concluded the records were admissible.

> "The records were subpoenaed … , they came directly to the court – I don't think there's any issue with regard to that … and they are admissible under the business records exception. I do acknowledge [the objections from both defense attorneys], that unless there's some foundation laid as to Detective Federico interpreting these documents, the Court's satisfied, one, that *they can be received in evidence under [Evidence Code sections] 1560,*

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evidence for use at trial. (See, e.g., *United States v. Yeley-Davis* (10th Cir. 2011) 632 F.3d 673, 679; *United States v. Green* (11th Cir. 2010) 396 Fed.Appx. 573, 575.)

> *[15]61, as a business record, and we have the declaration that's affixed to the exhibit*…. [¶] … [¶]
>
> "*Attached on the front of the document, the declaration of authenticity of AT&T records. So they are admissible in that regard*. But what I would say is that, unless there is some foundation laid by the detective to interpret them, I would not allow her to interpret because basically it is her interpretation of what these records say. That wouldn't stop anybody from … arguing what they say in closing argument. They're received – if I make that ruling received in evidence. The offer of proof – if we get the number to Ms. Cabbel – and the offer of proof is that – if you're going to get that testimony – we may have heard it already, I just can't recall." (Italics added.)

The court thus admitted the records evidence but excluded any interpretative testimony from Detective Federico.

After the court's ruling, the jury was advised the cell phone records were introduced into evidence. The prosecution did not call any witnesses to explain the records.

I. <u>Closing Arguments</u>

In closing argument, the prosecutor argued Gonzalez's cell phone records raised the inference that the cell phone was stolen during the robbery/murder in the alley; Guerrero and/or Sanchez used it call Cabbel; she received it as payment for participating in the robbery; and she used it to call her boyfriend.

Cabbel's attorney attacked the cell phone records as speculative, and argued there was no evidence Cabbel actually received Gonzalez's cell phone from any of the suspects for any reason. Counsel argued it was just as likely that she may have used it because her own cell phone battery was dead and then returned it to the suspects.

During deliberations, the jury requested to review Gonzalez's cell phone records.

J. <u>Authentication</u>

As set forth, *ante*, Evidence Code section 1271 provides that "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the

hearsay rule" if it meets all of the following requirements: (1) the writing was made in the regular course of a business; (2) it was made at or near the time of the act, condition, or event; (3) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation was such as to indicate its trustworthiness. (Evid. Code, § 1271.)

"Authentication of a writing … is required before it may be admitted in evidence. [Citations.] Authentication is to be determined by the trial court as a preliminary fact [citation] and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law [citation].' (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

In *Zavala, supra,* 216 Cal.App.4th 242, the court held cell phone records were admissible as business records. In that case, two defendants were arrested for a series of robberies. The police obtained the cell phone records for one defendant, which showed numerous calls to the second defendant and to locations where the robberies occurred. At trial, the prosecution introduced evidence from the custodians of records from the cell phone carriers, who explained the contents of the records and how they were generated. The trial court held the records were admissible under Evidence Code section 1271. (*Id.* at pp. 245–246.)

Zavala reviewed a series of federal circuit cases which addressed the admissibility of computer-generated records, and concluded:

> "[A] printed compilation of call data produced by human query for use at trial falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business. In this case, the printed excel spreadsheet produced at trial of the call data recorded by [the cell phone carriers'] computer systems fell within that exception.

> "The evidence at trial established the call data was automatically generated by [the carrier's] computer system at or near the time each call was made.… [¶] [Both witnesses] were the custodians of the data produced by [the carriers], and each provided ample testimony as to the mode of preparation of the documents entered at trial …. That the documents ultimately entered in trial were necessarily produced by human query does not render the data inadmissible because the underlying data itself was not produced by human input, but rather, was recorded by the computer system itself each time a user made a call." (*Zavala*, *supra*, 216 Cal.App.4th at p. 248.)

Zavala thus provides for the admission of computer-generated cell phone records under the business records exception to the hearsay rule.

Cabbel argues that *Zavala* is inapplicable to this case because the prosecution failed to call the custodian or any expert to explain the derivation of Gonzalez's cell phone records, whereas the cell phone records were admissible in *Zavala* because the custodians testified and provided the requisite authenticity.

The question in this case, however, is whether Gonzalez's cell phone records were admissible under Evidence Code 1271, regardless of whether a custodian appeared at trial. In Evidence Code sections 1560 et seq., "the Legislature has provided a streamlined method for the production of the records of a business in response to a subpoena duces tecum." (*Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1705 (*Taggart*), overruled on other grounds as explained in *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1044 (*Cooley*).) When responding to a subpoena duces tecum, Evidence Code section 1560 permits the custodian of business records or other qualified witness, unless otherwise directed in the subpoena, to comply with the subpoena by mailing copies of the requested records to the clerk of the court together with the affidavit described in Evidence Code section 1561. (Evid. Code, § 1560, subd. (b).)

Evidence Code section 1561 provides in pertinent part:

> "(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

"(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

"(2) The copy is a true copy of all the records described in the subpoena duces tecum ….

"(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

"(4) The identity of the records.

"(5) A description of the mode of preparation of the records."

Cabbel argues the custodian's declaration was insufficient under *Taggart*, *supra*, 33 Cal.App.4th at p. 1705. In that case, a custodian's declaration in support of certain business records complied with the version of Evidence Code section 1561 which was applicable at the time, but did not contain subdivisions (a)(4) and (a)(5). *Taggart* held the declaration failed to provide a sufficient foundation for the admission of business records since that previous version of section 1561 did not include all the elements required by section 1271. (*Taggart*, *supra*, 33 Cal.App.4th at p. 1706.)

In response to *Taggart*, section 1561 was amended " 'to ensure that such [nonparty business] records may continue to be admissible without requiring their authenticity to be proved through live testimony from the custodian of records or other qualified witness.' [Citation.]" (*Cooley*, *supra*, 140 Cal.App.4th at p. 1045.) As a result, an affidavit that has been prepared in accordance with Evidence Code section 1561 establishes the admissibility of the proffered business records under Evidence Code section 1271. (*Cooley*, *supra*, 140 Cal.App.4th at pp. 1044–1045.) "If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the

matter so stated are presumed true …. *The presumption established by this section is a presumption affecting the burden of producing evidence*." (Evid. Code, § 1562, italics added.)

K. Analysis

As we have already noted, Cabbel never objected to the sufficiency of the custodian's declaration or authentication of Gonzalez's cell phone records and conceded the documents were admissible as business records. The prosecution's introduction of the custodian's declaration under Evidence Code sections 1560 et seq. raised the presumption that the records were admissible under section 1271, a presumption affecting the burden of producing evidence, and the defense did not raise any objections or present any evidence to contradict that presumption. The failure to challenge the authentication of the records bars her from asserting these contentions on appeal. (*People v. Farnam* (2002) 28 Cal.4th 107, 159.)

As for Cabbel's alternate theory of ineffective assistance, her attorney was certainly aware of the potential importance and impact of these records, and successfully objected to Detective Federico's proposed testimony to explain the contents of the records. Moreover, the record suggests possible reasons why neither defense attorney challenged the declaration or authentication.

Cabbel asserts Ms. Wherry's declaration "[a]t best" only established that she was the custodian of documents and failed to establish the records were made in the regular course of business, at or near the time of the act, condition or event recorded, or the mode of the records' preparation. We disagree. In her "Declaration of Authenticity," Ms. Wherry stated she was an accounting clerk and custodian of records for AT&T, which satisfied section 1561, subdivision (a)(1). The declaration further stated the attached records were "true and correct copies" of "the subscriber information and/or call detail," which were "issued by AT&T" for Gonzalez's account and cell phone number, for the

period of June 5 through June 7, 2010, and she declared under penalty of perjury that the foregoing was true and correct. These statements satisfied section 1561, subdivision (a)(2), that the documents were a "true copy of all the records" described in the subpoena; and subdivision (a)(4), the identity of the records.

Cabbel contends that Ms. Wherry's declaration failed to address section 1561, subdivision (a)(3), that the records "were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event," and subdivision (a)(5), a description "of the mode of preparation of the records." We again disagree. The declaration stated the records contained "the subscriber information and/or call detail" which were "*issued by AT&T*" for Gonzalez's account and cell phone number. Moreover, the documents identified the date and time the transmission reports were generated by AT&T in response to the subpoena, raising the inference that AT&T personnel generated the reports at a certain time and date in response to the subpoena, and each line of information in the "Mobility Usage" report states the time and date the call data was recorded by AT&T.

The court has wide discretion to determine if a proper foundation has been laid for the admission of business records, and its conclusion will not be disturbed in the absence of an abuse of that discretion. (*People v. Goldsmith*, *supra*, 59 Cal.4th at p. 266.) The statutory means for authenticating a writing are not exclusive. (Evid. Code, § 1410.) Authentication of a writing may be established by circumstantial evidence and its contents. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187–1188; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.) " 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*People v. Goldsmith*, *supra*, 59 Cal.4th at p. 267.)

"Although the trial court is accorded discretion in determining whether evidence sufficient to support the trustworthiness of a business record has been introduced, the court cannot ignore favorable evidence merely because the offering party did not follow the standard or preferred method of laying the foundation for admission…." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324.) In making the foundational finding, the court may rely on the evidence of trustworthiness and authenticity contained within the documents themselves. (See, e.g., *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798.) We find the entirety of the declaration and attached documents satisfied the requirements of Evidence Code sections 1271 and 1561, a conclusion which the defense attorneys may have also reached, and the court did not abuse its discretion when it admitted Gonzalez's cell phone records.

The record also suggests another reason that both defense attorneys did not challenge the custodian's declaration. During the hearing on the admissibility of the cell phone records, the prosecutor moved to have Detective Federico explain and interpret the logs which identified calls from Gonzalez's cell phone to the cell phones of Cabbel and her boyfriend shortly after the murder. Both defendants raised hearsay objections to Federico's proposed testimony about the contents of the cell phone records, and the court agreed that she could not interpret or explain the records. Both defendants then argued that the cell phone records were irrelevant and inadmissible in the absence of expert testimony to explain the notations. The court disagreed based on the extensive explanations contained in the "Legend," and held the records were admissible and the attorneys could argue about the inferences raised from the records in closing arguments.

It is reasonable to assume that if defendants challenged the sufficiency of the custodian's declaration under Evidence Code section 1561, the prosecutor could have easily responded by issuing another subpoena and obtaining a more detailed declaration. However, the prosecutor may have instead decided to call an expert witness from AT&T

to address the defense objections to the declaration. If so, the defense objections might have resulted in testimony from a custodian, who would have been able to explain and interpret the contents of the records – evidence which both defense attorneys were trying to avoid.

We thus conclude that defense counsel's failure to object to the declaration and authentication of Gonzalez's cell phone records was not ineffective or prejudicial because the entirety of the documents satisfied the requirements of Evidence Code section 1561, and the court did not abuse its discretion in finding the documents were admissible as business records.

II. Gutierrez's Status as an Accomplice

As explained in the facts, above, Hernandez and Miranda were originally charged with the same offenses as Guerrero and Cabbel. Hernandez and Miranda pleaded guilty to conspiracy to commit robbery and voluntary manslaughter, and agreed to testify for the prosecution as part of their plea agreements. While Gutierrez was detained and arrested for other matters, he was never arrested or charged with any offenses in this case, and did not receive any benefits for his prosecution testimony.

The jury was instructed that Hernandez and Miranda were accomplices as a matter of law, and it was a question of fact for the jury to determine whether Gutierrez was also an accomplice. It received the correct pattern instructions which defined an accomplice and that the testimony of accomplices had to be independently corroborated.

Based on this background, Guerrero and Cabbel raise several issues regarding the accomplice instructions and the testimony of Hernandez, Miranda, and Gutierrrez. As we will discuss in issue III, *post*, Guerrero asserts the court had a sua sponte duty to instruct the jury about derivative liability principles to determine whether Gutierrez was an accomplice. Guerrero asserts this alleged error was prejudicial because if the jury had been correctly instructed, it would have concluded Gutierrez was an accomplice, his

testimony had to be corroborated, and there was insufficient evidence of corroboration. Cabbel joins in this issue. As we will discuss in issue IV, *post*, Guerrero and Cabbel argue there was no independent corroboration for the testimony from Gutierrez, Hernandez, and Miranda that implicated them in this case.

We will address each aspect of the defendants' contentions in light of the well-recognized principles applicable to the testimony of accomplices.

A. Accomplices

"No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense, an 'accomplice' being one who is liable to prosecution for the identical offense charged against the defendant on trial. [Citation.]" (*People v. Coffman and Marlowe* (2004) 34 Cal.4th 1, 103; Pen. Code, § 1111.)

When there is sufficient evidence that a witness is an accomplice, the trial court has a sua sponte duty to instruct the jury both on the principles and requirement for corroboration of accomplice testimony. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Zapien* (1993) 4 Cal.4th 929, 981–982.)

"For instructional purposes, an accomplice is a person 'who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 142–143; § 1111.) "This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. Manibusan* (2013) 58 Cal.4th 40, 93; § 31.)

"An accomplice need not share in the actual perpetration of a crime to be chargeable as a principal therein; liability as an accomplice to a crime may be based on having aided and abetted its commission…." (*People v. Snyder* (2003) 112 Cal.App.4th

1200, 1220.) "A 'person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 40.) "[A]n aider and abettor is chargeable as a principal only to the extent he or she actually knows and *shares* the full extent of the perpetrator's specific criminal intent, and actively promotes, encourages, or assists the perpetrator with the intent and purpose of advancing the perpetrator's successful commission of the target offense." (*People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1220, italics in original, fn. omitted.)

An accessory after the fact is not an accomplice under section 1111. (*People v. Daniels* (1991) 52 Cal.3d 815, 867; *People v. Felton* (2004) 122 Cal.App.4th 260, 268.) An accessory after the fact is a person "who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, ... having knowledge that said principal has committed such felony …, is an accessory to such felony." (§ 32.) "[T]here must be proof that a principal committed a particular felony, the accused knew the principal committed a felony, the accused did something to help the principal get away with the crime, and the accused acted with the intent to help the principal get away with the crime. [Citation.]" (*In re Malcolm M.* (2007) 147 Cal.App.4th 157, 165.) "The accomplice testimony rule does not apply, and accomplice testimony instructions need not be given, where the witness in question was involved in the crime but was not actually an accomplice, but only an accessory after the fact. [Citations.]" (*People v. Mackey* (2015) 233 Cal.App.4th 32, 123.)

The trial court may determine that a witness is an accomplice as a matter of law only when the facts establishing a witness's criminal culpability are clear and undisputed.

(*People v. Hayes* (1999) 21 Cal.4th 1211, 1272.) If, however, the evidence is disputed or supports conflicting inferences, the trial court must instruct the jury to make a factual determination whether the witness was an accomplice. (*Ibid*.; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. Zapien, supra,* 4 Cal.4th at pp. 981–982.) In that case, the defendant bears the burden of establishing the witness is an accomplice by a preponderance of the evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 967–968, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

B. Gutierrez's Status

We begin by addressing an issue that Guerrero and Cabbel have not expressly raised, but which is implicit throughout their contentions about the accomplice instructions and the alleged lack of corroboration for Gutierrez's testimony: Their disbelief the jury could have concluded Gutierrez was not an accomplice, and why the court instructed the jury that Hernandez and Miranda were accomplices as a matter of law but it was a question of fact for the jury to determine whether Gutierrez was also an accomplice.

Hernandez and Miranda were clearly accomplices as a matter of law. They were originally charged with the same offenses as Guerrero and Cabbel: Murder with the robbery special circumstance, attempted murder, robbery, and attempted robbery. They pleaded guilty to conspiracy to commit robbery and voluntary manslaughter, agreed to testify truthfully at the trial of Guerrero and any other defendants charged in this case, and faced terms of 11 years, if they complied with their agreement. At trial, there were some variations in their details about the events of that night, but admitted their agreement and participation in the plan to meet men in the bar, take whatever they could get from them, and lure them outside for Guerrero and Sanchez to rob them. While they claimed to have been surprised when Guerrero and Sanchez assaulted the victims in the

alley with weapons, they were still aware of the robbery plan and directed the victims to take them to the secluded alley, where the robbery and murder occurred.

As for Gutierrez, there was conflicting evidence as to his initial knowledge and involvement. Gutierrez admitted he saw Hernandez, Miranda, Guerrero, Sanchez and Cabbel talk in the carport and leave the party, but repeatedly insisted he did not know where they were going or what they were planning. Hernandez testified that during the party, Guerrero and Sanchez talked to the young women about what they wanted them to do at the bar. Hernandez said that Gutierrez was in the apartment when Guerrero and Sanchez talked about the plan, but he was not part of the conversation and he did not hear what they were talking about. When Miranda initially spoke to the police, she implicated Guerrero and Sanchez in the plan, and she did not say anything about Gutierrez. At trial, however, Miranda claimed that Gutierrez spoke to her at the party, told her about the plan to lure men from the bar, and that Guerrero and Sanchez would take care of her.

Neither Hernandez nor Miranda said that Gutierrez got into Cabbel's car or went to the bar with them. Flores, the bar's security guard, said the man who got out of the car and gave instructions to the two young women was bald and had cursive tattoos on his neck, a description consistent with Guerrero and not Gutierrez. While Hernandez and Miranda knew they had directed Gonzalez to drive in the alley near Gutierrez's apartment, neither witness said that Gutierrez sent them text messages, told them what to do, he was in the alley, or that he participated in the robbery and murder.

When Gutierrez was initially interviewed by the police, he repeatedly lied and gave false names for the people who had been at his party. After numerous interviews, Gutierrez eventually admitted he heard a commotion at his apartment that night, he went outside, he saw an unfamiliar car in the carport, Sanchez and Miranda were arguing, and Sanchez washed blood off his hands. Gutierrez admitted he moved the car down the street, and that Guerrero reappeared at his apartment the next day and tried to burn his

sweater in the barbeque grill. Gonzalez's vehicle registration documents were found in Gutierrez's apartment, Gonzalez's blood was on Gutierrez's shoes, and Gutierrez admitted he tried to wash off the blood. A shotgun and knives were found in Gutierrez's apartment, but there was no forensic evidence on the knives and Gonzalez's head wound was not inflicted by a shotgun.

Based on Gutierrez's admissions and testimony, and the physical and forensic evidence, there was certainly strong evidence that Gutierrez was an accessory after the fact. However, an accessory after the fact is not an accomplice for purposes of the cautionary instructions on corroboration. As for aiding and abetting, Hernandez and Miranda offered conflicting testimony about whether Gutierrez knew about, originated, and/or participated in the robbery plan before they left the apartment and headed to the bar. "[A] trial court can determine 'as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are ' "clear and undisputed." [Citations.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 565 (*Avila*).) The facts as to Gutierrez's culpability as an aider and abettor were not clear and undisputed, and the court properly decided that it was a question of fact for the jury to determine whether Gutierrez was an accomplice whose testimony required corroboration.

C. <u>The Accomplice Instructions</u>

In section III, *post*, we will address defendants' challenges to the accomplice instruction. However, we note the instructions that were given in this case were sufficient for the jury to determine if Gutierrez was an accomplice. The jury received CALCRIM No. 334, which stated:

> "Before you may consider the statement or testimony of Francisco Gutierrez as evidence against the defendants regarding the crime of conspiracy to commit robbery, robbery, or attempted robbery, you must decide whether Francisco Gutierrez was an accomplice to that crime. A person is an accomplice if he or she is subject to prosecution for the

identical crime charged against the defendant. Someone is subject to prosecution if:

"1. He or she personally committed the crime;

"*Or 2. He or she knew of the criminal purpose of the person who committed the crime*;

"*And 3. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime*.

"The burden is on the defendant to prove that it is more likely than not that Francisco Gutierrez was an accomplice.

"A person may be an accomplice even if he or she is not actually prosecuted for the crime.

"If you decide that a declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness.

"If you decide that a declarant or witness was an accomplice, then you may not convict a defendant of conspiracy to commit robbery, robbery, or attempted robbery, based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"1. The accomplice's statement or testimony is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's statement or testimony;

"And 3. That supporting evidence tends to connect the defendant to the commission of the crime.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The

> supporting evidence must tend to connect the defendant to the commission of the crime.
>
> "The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.
>
> "Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence." (Italics added.)

The jury was thus instructed that Gutierrez was an accomplice if he personally committed the offenses, or he was an aider and abettor.

As to the status of Hernandez and Miranda, the jury received CALCRIM No. 335:

> "If the crimes of conspiracy to commit robbery, robbery, or attempted robbery were committed, then Hernandez Hernandez and Miranda Miranda were accomplices to those crimes. [¶] You may not convict a defendant of conspiracy to commit robbery, robbery, or attempted robbery based on the statement or testimony of an accomplice alone."

The instruction continued with the same corroboration requirements as stated in CALCRIM No. 334.

Also as to accomplices, the jury received CALCRIM No. 301, that the testimony of only one witness can prove any fact "[e]xcept for the testimony of" Hernandez and Miranda, "which requires supporting evidence, and "[e]xcept for the testimony" of Gutierrez, "which requires supporting evidence if you decide he is an accomplice." It also received CALCRIM No. 373, that the jury must not speculate about why other persons were not prosecuted, but that cautionary language did not apply to the testimony of Hernandez and Miranda.

The question before the jury in this case was straightforward: Whether it believed Miranda's trial claim that Gutierrez was the person who told the two young women that they were going to help them rob men at the bar, or Hernandez's testimony that Gutierrez

did not know what they were talking about or planning to do when they left his apartment.[24] CALCRIM No. 334 stated Gutierrez was an accomplice if he personally committed the crime, or he "knew of the criminal purpose of the person who committed the crime" and he "intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime *or participate in a criminal conspiracy to commit the crime*."

The damaging physical and forensic evidence against Gutierrez could have supported either view: He helped plan the robbery, Hernandez and Miranda guided the victims to the alley near Gutierrez's apartment, Gutierrez stripped the interior of the victim's car, and he stepped in the victim's blood as he moved the victim's car from the alley to the street. However, the same evidence also supported Hernandez's testimony that he did not know what they were planning, and the conclusions that he was an accessory after the fact and tried to cover up for his friends.

We also note that it was "virtually certain" the jury would have viewed aspects of Gutierrez's testimony with caution and distrust, given his admissions that he repeatedly lied to the police, and the damaging physical and forensic evidence, particularly the discovery of the victim's blood on his shoes and the victim's vehicle registration in his apartment. Miranda's claim that Gutierrez was the "mastermind" of the robbery plan would have been amply supported by this evidence. (See, e.g., *People v. Mackey, supra,* 233 Cal.App.4th at p. 125.)

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[24] Guerrero asserts that both Hernandez and Miranda testified Gutierrez "was a co-conspirator, an aider and abettor, and accordingly an accomplice." This assertion is not supported by the record. In their pretrial statements to the police, neither Hernandez nor Miranda implicated Gutierrez as being involved in the robbery plan. At trial, Hernandez testified that Gutierrez was in the apartment when Guerrero and Sanchez told her about the plan, but that Gutierrez was not part of the conversation and did not participate in the plan. In contrast, Miranda testified that she lied when she spoke to the police, and that Gutierrez was the first person who talked to her about the robbery plan and explained the details to her.

III. Defendants' Claim of Instructional Error

Guerrero contends the jury was not fully and accurately instructed on the applicable principles to determine whether Gutierrez was an accomplice. Guerrero points to the "derivative liability" instructions which were given to the jury to determine the defendants' liability for the charged offenses – aiding and abetting, conspiracy, felony murder, and the natural and probable consequences doctrine.[25] Guerrero does not challenge the correctness of these instructions as they applied to defendants' liability. Instead, he contends the court had a sua sponte duty to modify these instructions to explain that Gutierrez was liable for robbery and murder based on the same derivative liability principles, and thus an accomplice whose testimony required corroboration.

Guerrero asserts there was no independent evidence to corroborate Gutierrez's accusations against him, and posits that the only way the jury could have convicted him was because it determined Gutierrez was not an accomplice and it did not have to corroborate his testimony. Guerrero asserts that in the absence of modified instructions on Gutierrez's potential derivative liability, the jury lacked guidance to determine whether Gutierrez was an accomplice, and the error was prejudicial because of the alleged absence of corroborating evidence.

Cabbel joins in this argument and similarly asserts the jury was not correctly instructed on how to determine whether Gutierrez was an accomplice and improperly relied on his uncorroborated testimony to convict her.[26]

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[25] As for the defendants' guilt for the charged offenses, the jury was instructed on the "derivative liability" principles of aiding and abetting (CALCRIM No. 401); conspiracy (CALCRIM Nos. 413, 417); felony first degree murder as a participant and nonparticipant (CALCRIM Nos. 540A, 540B, 549); and the natural and probable consequences doctrine as to the target and nontarget offenses (CALCRIM No. 402).

[26] In section IV, *post*, we will address the additional arguments made by Guerrero and Cabbel that the alleged instructional error was prejudicial and their convictions must be reversed because there was no independent evidence to corroborate the accomplice testimony of Gutierrez, Hernandez, and Miranda.

A. ***Prettyman* and *Avila***

Neither Guerrero nor Cabbel challenged the correctness of pattern accomplice instructions which were given to the jury. They did not request any modifications or assert the derivative liability instructions about the defendants' liability for the charged offenses had to be extended to Gutierrez's status as an accomplice. Their failure to object to standard instructions which correctly state the law forfeits the claim of error on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Bolin* (1998) 18 Cal.4th 297, 329.)

Defendants seek to avoid forfeiture by asserting the court had a sua sponte duty to modify the derivative liability instructions to address Gutierrez's status as an accomplice pursuant to *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*) and *Avila*, *supra*, 38 Cal.4th at p. 497).

Prettyman addressed the correctness of instructions given to determine a defendant's liability for murder as an accomplice, and explained the application of the "natural and probable consequences" theory. "Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*Prettyman, supra,* 14 Cal.4th at p. 254.)

Prettyman held a trial court has a "quite limited" sua sponte duty to instruct on the natural and probable consequences theory "whenever uncharged target offenses form a part of the prosecution's theory of criminal liability and substantial evidence supports the theory." (*Prettyman*, *supra*, 14 Cal.4th at pp. 266–267, 269.) *Prettyman* explained the natural and probable consequences doctrine "is based on the recognition that " 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]" (*Id*. at p. 260.) "[W]hen the prosecution relies on the 'natural and probable consequences' doctrine to hold a *defendant* liable as an aider and abettor, the trial court must, on its own initiative, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*Id*. at pp. 268–269, italics added.)

In *Avila*, the court considered the application of *Prettyman's* instructions regarding *a defendant's liability*, to the jury's determination of whether *two witnesses* – Rodriguez and Rojas – were accomplices and their testimony required corroboration. The defendant relied on *Prettyman* and argued the court's accomplice instructions were incomplete because it had a sua sponte duty to instruct that *the witnesses* could be accomplices under the natural and probable consequences doctrine, as applicable to the charged offenses in that case. (*Avila*, *supra*, 38 Cal.4th at p. 567.)

Avila explained defendant's attempt to extend *Prettyman* to accomplice situations, and rejected the argument:

> "Although the holding in *People v. Prettyman* … was limited to reliance on the natural and probable consequences doctrine to hold a *defendant* liable as an aider and abettor, its reasoning actually applies with greater force here. In this case, the prosecution did not charge defendant with kidnapping, and neither the prosecution nor the defense claimed at trial that any of the defendants or potential accomplices were involved in a kidnapping. Under these circumstances, Rodriguez's potential liability for murder for aiding and abetting a kidnapping based on the natural and probable consequences doctrine was not a general principle of law that was

> closely or openly connected with the facts presented at trial, on which the court had a sua sponte duty to instruct, for there was no 'risk that the jury, generally unversed in the intricacies of criminal law, [would] "indulge in unguided speculation" [citation] when it applied the law to the evidence adduced at trial.' (*Id.* at p. 267.) To hold otherwise would be tantamount to requiring the trial court ' "to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly." ' (*Id.* at p. 269.)
>
> "Similarly, although the prosecution argued that the defendants on trial could be liable for murder under a theory of felony-murder rape, neither the prosecution nor the defense argued that any one of the potential accomplices were liable for murder, under the natural and probable consequences doctrine, because he aided and abetted a rape. Under these circumstances, Rojas's potential liability for murder on such a theory was not a general principle of law that was closely or openly connected with the facts presented at trial, on which the court had a sua sponte duty to instruct." *(Avila, supra*, 38 Cal.4th at pp. 567–568.)

Avila concluded the absence of an instruction on the natural and probable consequences doctrine, as it might have applied to the two witnesses as accomplices, was not prejudicial because the witnesses' testimony was sufficiently corroborated by independent evidence. (*Avila, supra*, 38 Cal.4th at p. 568.)[27]

Guerrero relies on *Avila* and asserts the court had a sua sponte duty to modify the derivative liability instructions given as to defendants' guilt, and direct the jury to consider the same instructions to determine whether Gutierrez was an accomplice. Guerrero asserts the prosecution relied on these theories to argue that Guerrero and Cabbel were guilty of the charged offenses, since Cabbel was not present when the

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[27] In *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335 (*Bryant*), the defendants argued a witness was an accomplice as a matter of law under the natural and probable consequences theory of aiding and abetting, based on his participation in the defendants' gang and drug conspiracy. *Bryant* did not discount that the natural and probable consequences theory might be applicable to determine whether a witness was an accomplice, but concluded the theory was not supported by the evidence because it could not be said as a matter of law "that one of the reasonably foreseeable results of the drug dealing conspiracy was this particular set of murders. [Citations.]" (*Id.* at p. 431.)

robbery and murder occurred, and Guerrero was being charged with the attempted robbery and attempted murder committed by Sanchez. "All of those principles applied equally to … Gutierrez's role as an accomplice, and the defense was clearly asserting that he had been an accomplice, as that was a central theme of Mr. Guerrero's counsel's arguments to the jury."

As we will explain in issue IV, *post*, we will find in this case, as in *Avila*, that any alleged instructional error, including whether the court had a sua sponte duty to modify the accomplice instructions according to *Prettyman*, was not prejudicial because the testimony of Gutierrez, along with that of Hernandez and Miranda, was sufficiently corroborated by independent evidence of defendants' guilt. (*Avila, supra,* 38 Cal.4th at p. 568.)

IV. Corroboration of Accomplice Testimony

Guerrero contends the alleged instructional error discussed in issue III, *ante*, is prejudicial because of the lack of corroborating evidence for the testimony of the three accomplices. Guerrero asserts that aside from the testimony of Hernandez, Miranda, and Gutierrez, there was "virtually no independent evidence" against the defendants to corroborate the accomplice testimony as required by section 1111.

Cabbel joins in Guerrero's argument about the alleged prejudice from the claimed instructional error about Gutierrez's accomplice status. Cabbel separately argues the evidence was "too flimsy" to independently corroborate the testimony from Hernandez and Miranda, who were determined by the court to be accomplices as a matter of law.

A. Section 1111

As explained above, section 1111 provides, in relevant part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and

the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

"The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must, without aid from the accomplice's testimony, tend to connect the defendant with the offense. The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 218.)

Corroborating evidence is " 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 148.) "The requisite corroboration may be established entirely by circumstantial evidence. [Citations.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 100, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) Eyewitness corroboration of the defendant actually committing the offense is not necessary. (*People v. Miranda*, *supra*, 44 Cal.3d at p. 100.) The defendant's own conduct and statements may furnish adequate corroboration for the testimony of an accomplice. (*People v. Williams* (1997) 16 Cal.4th 635, 680.)

The trial court's failure to properly instruct the jury on accomplice testimony, including the complete failure to give accomplice instructions, is harmless if the record contains sufficient evidence of corroboration. (*People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Manibusan*, *supra*, 58 Cal.4th at p. 95.)

B. Analysis

The record contains sufficient corroborating evidence from nonaccomplice witnesses which connects both Guerrero and Cabbel with the commission of the crimes of conspiracy, murder, and robbery, as required by section 1111.

As relates to Cabbel, the bar's security guard and his girlfriend saw a female driver and a vehicle arrive at the bar's parking lot, both of which matched the description of Cabbel and her car. A bald Hispanic man and two young Hispanic women got out. The two women were later identified by the victims as Hernandez and Miranda, and the man matched Guerrero's description. The female driver stayed in the car, the men got back into the car, and the car remained in the area while Hernandez and Miranda walked to the bar. When the women returned to the parking lot with the victims, the same car and driver followed the victims' green van as it drove away from the bar with Hernandez and Miranda. The victim's cell phone was used to call Cabbel's cell phone several times immediately after the victim was killed, and then it was used to place multiple calls to the telephone numbers associated with Cabbel's boyfriend.

As for Guerrero, the security guard testified that the man who got out of the car with the two young women was bald with cursive tattoos on his neck, which matched Guerrero's description. The guard and his girlfriend testified the bald man told the two young women to " 'go try,' " " 'go try it,' " or " 'go inside and try,' " consistent with the accomplices' description of the conspiracy. After that brief conversation, the bald man got back into the car. Hernandez and Miranda walked to the bar, met the victims, left in the victims' green van, and the same car followed the green van as it drove away from the bar.

Gutierrez's neighbor testified Guerrero was staying at Gutierrez's apartment at that time; she heard gunshots at some point on Saturday night; she saw the police at Gutierrez's apartment on Sunday morning; and she saw Guerrero leave the apartment on

Sunday afternoon and he was carrying a bag of clothes. The neighbor asked Guerrero whether he was going to do the laundry and he replied that he was leaving. When the police subsequently executed the search warrant at Gutierrez's apartment, they found paperwork with Guerrero's name, the vehicle registration for the victim's stolen car, and the charred remains of burnt clothing in the barbeque grill which had not been there before Guerrero left. Guerrero was arrested two weeks later having fled to Washington.

C. Additional Corroborative Details

In addition to the testimony from nonaccomplices which connected the two defendants to the crimes as required by section 1111, we note that other aspects of the testimony from Gutierrez, Hernandez, and Miranda were corroborated by independent evidence. While this evidence may not have directly connected the defendants to the crimes, we believe these corroborative details "form part of a picture indicating the jury may [have been] satisfied that the accomplice[s were] telling the truth…." (*People v. Pedroza* (2014) 231 Cal.App.4th 635, 659.)

When the police arrived at Gutierrez's apartment in the hours after the murder, they found beer cans, tables, chairs, and the barbeque grill, which was consistent with the accomplices' description of the party. Gutierrez's neighbor testified Sanchez and some young women were also staying at the apartment, and Sanchez also left on Sunday afternoon with a bag of clothes. When the police later searched the apartment, they found paperwork in the names of Hernandez and Miranda, along with baby clothes and a photograph of Hernandez.

Hernandez and Miranda testified about how they met the victims in the bar's parking lot, Miranda texted with Cabbel for further instructions; Cabbel said it was okay to go, she was watching them, and "they got our backs"; they left in the victim's green van; and Miranda saw Cabbel's car follow the green van as they left the bar. The testimony from the surviving victims, and the security guard and his girlfriend,

corroborated this account, because they described how the victims met the young women in the parking lot, one woman was repeatedly texting on her cell phone, everyone left in the green van, and the sedan which brought the women to the bar followed the green van as it drove away.

Hernandez and Miranda testified they asked the men to buy their preferred brands of beer, which were Pacifico and Corona; they went to someone's apartment; the man who was later killed obtained methamphetamine; and they drank and used drugs. Jacobo and Mendoza corroborated they bought beer for the women, they went to Gonzalez's apartment, Gonzalez briefly left and returned with drugs, and they were drinking and using drugs for the rest of the night. When the police subsequently searched Gonzalez's apartment, they found bottles of Pacifico and Corona beer, and a device used to smoke methamphetamine.

Hernandez and Miranda testified about how they left Gonzalez's apartment: Miranda was texting with Cabbel when they were in the apartment and Gonzalez's car, Cabbel told her to have the men drive them to the west side and "park by the Park" near Gutierrez's apartment, Miranda gave these instructions to Hernandez when they were in the car, and Hernandez told the driver where to go. Jacobo and Mendoza corroborated this testimony and described how one woman kept texting when they were at the apartment, the women asked for a ride home, and they left in Gonzalez's car. Jacobo testified Gonzalez drove and Hernandez sat in the front seat, Jacobo and Miranda sat in the back seat, and Hernandez gave Gonzalez directions where to drive. Jacobo testified that when Gonzalez turned into the alley, both women said "this is it," Gonzalez parked the car, and the robbery and murder occurred shortly afterwards.

Hernandez and Miranda testified when they arrived in the alley, they briefly lingered with the men and then walked away from the car, Sanchez and Guerrero suddenly appeared, Guerrero accosted the driver (Gonzalez) while Sanchez demanded the

passenger's wallet (Jacobo), the women heard a gunshot, and the driver was on the ground. Jacobo partially corroborated this account: He said two Hispanic males suddenly appeared in the alley, demanded their wallets, and assaulted them. Jacobo was stabbed and passed out. Gonzalez died from a gunshot wound to the head, and he also had abrasions on his face that were inflicted by some type of object.

Hernandez and Miranda testified that after the shooting, they ran back to Gutierrez's apartment, and Hernandez fell down and scraped her arm and knee. Detective Federico testified Hernandez had scrapes on her arm and knee when she was interviewed a few days after the murder, consistent with the description of her fall on the pavement.

Gonzalez's body was found in an alley located near both Gutierrez's apartment and a park. The police found a Corona beer bottle and a broken bottle of Pacifico beer near his body. The beer bottles were the favored brands of Hernandez and Miranda, and the same as those found in the carport area of Gutierrez's apartment and inside Gonzalez's apartment.

Finally, Hernandez and Miranda testified that the plan was for everyone to split the proceeds from the planned robbery. Gonzalez's cell phone records corroborate this plan because it was used to call Cabbel's cell phone in the minutes after the murder, and then used to place multiple calls to Cabbel's boyfriend in the following hours. These calls support the inference that Guerrero and Sanchez took Gonzalez's cell phone, called Cabbel, and gave it to Cabbel as her share of the robbery proceeds.

We find there was sufficient independent evidence to connect the defendants with the commission of the offenses and corroborate the testimony of Hernandez, Miranda, and Gutierrez as required by section 1111. In addition, there was independent evidence to further corroborate the accomplices' testimony about the plan, the participants, and what happened that night.

V. Additional Issues About the Accomplice Instructions

We now turn to additional issues raised by Guerrero about the impact of the alleged instructional error about Gutierrez's accomplice status. Cabbel joins in these arguments.

A. Prejudice Analysis

Guerrero acknowledges the well-recognized standard of review discussed in issue IV, above, that a trial court's failure to properly instruct the jury on accomplice testimony is harmless if the record contains sufficient evidence of corroboration. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 370; *People v. Frye*, *supra*, 18 Cal.4th at p. 966.) We have addressed and rejected Guerrero's claim that the evidence of corroboration was insufficient.

In the alternative, Guerrero asserts that there are two lines of authority as to the appropriate standard to review the failure to properly instruct on accomplice testimony. Defendant argues *Frye* and other California Supreme Court cases which have applied the corroboration standard of review were wrongly decided, and the failure to instruct on accomplice testimony should be reviewed pursuant to *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) and article VI, section 13 of the California Constitution. Guerrero contends that under this standard, his convictions must be reversed because it is reasonably probable that a more favorable result would have occurred in the absence of the instructional error about Gutierrez's accomplice status.

In *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254 (*Gonzales*), however, the California Supreme Court considered and rejected the identical argument. *Gonzales* held the trial court's failure to give any accomplice instructions was harmless because the witness's testimony was sufficiently corroborated by other evidence. (*Id*. at p. 302.) *Gonzales* rejected the defendant's argument that prior cases had exclusively reviewed the instructional error under *Watson*. *Gonzales* clarified that "*in the absence of sufficient*

corroboration we will submit the omission of accomplice instructions to the harmless error analysis for state law error" under *Watson*. (*Id*. at p. 304, italics in original.)

Having found sufficient corroborative evidence in this case, we follow *Gonzales* and reject Guerrero's claim that any instructional error must be reviewed under *Watson*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. Due Process

Guerrero separately argues that as a result of the trial court's failure to modify the derivative liability instructions to apply to Gutierrez, the jury was not instructed "on all relevant principles governing accomplice testimony," which resulted in a violation of his constitutional rights to due process and a fair trial and requires reversal under *Chapman v. California* (1967) 386 U.S. 18.

"Under federal law 'the use of accomplice testimony is not catalogued with constitutional restrictions.' [Citations.]" (*People v. Mackey*, *supra*, 233 Cal.App.4th at pp. 123–124, 182.) Moreover, we have already concluded that there was sufficient evidence to corroborate the testimony of Hernandez, Miranda, and Gutierrez. For similar reasons, there is no merit to Guerrero's claim that the alleged instructional error violated his constitutional rights to due process and a fair trial. (*People v. Arias*, *supra*, 13 Cal.4th at p. 143; *People v. Lewis*, *supra*, 26 Cal.4th at p. 371; *People v. Valdez*, *supra*, 55 Cal.4th at p. 148.)

C. Ineffective Assistance

Finally, Guerrero contends that if we conclude the trial court did not have a sua sponte duty to modify the derivative liability instructions to address Gutierrez's accomplice status, and defense counsel failed to preserve review of the issue, his attorney was prejudicially ineffective for failing to make the appropriate objections.

We have concluded that based on the well-recognized standard of review from the California Supreme Court, any instructional error was not prejudicial because there was

sufficient independent evidence to corroborate the testimony of Gutierrez, and also the testimony of Hernandez and Miranda. We thus conclude that defense counsel's failure to object or request modification of the accomplice instructions was not prejudicial.

VI. Substantial Evidence for Attempted Premeditated Murder

Guerrero and Cabbel were convicted of count I, conspiracy to commit robbery, and count III, the attempted premeditated murder of Jacobo. The prosecution's theory was that Sanchez stabbed Jacobo, and that defendants were guilty of attempted murder as coconspirators and that it was a natural and probable consequence of the robbery.

Cabbel contends the evidence was legally insufficient to prove her guilt for attempted murder and that it was a natural and probable consequence of the plan to commit a robbery at the bar. Cabbel argues there was no evidence she participated in planning the robbery, or that Guerrero and/or Sanchez were armed, or they would use weapons against the victims. Guerrero generally joined all of Cabbel's issues without analysis, and this issue would potentially apply to him since he was not the direct perpetrator of the attempted murder of Jacobo.

A. Substantial Evidence

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th 297, 331.)

"The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two

interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.] 'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove [her] guilt beyond a reasonable doubt.' [Citation.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932–933; *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)[28]

B. <u>Natural and Probable Consequences</u>

As discussed above, the jury was instructed on conspiracy and the natural and probable consequences theories as to whether the defendants were guilty of the charged offenses. A defendant's liability as a conspirator is based on the same analysis as that under the natural and probable consequences doctrine of aiding and abetting. (*People v. Prieto* (2003) 30 Cal.4th 226, 249–250; *People v. Guillen* (2014) 227 Cal.App.4th 934, 999.)

"The law has been settled for more than a century that each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design. [Citations.] [¶] Recognizing that criminal agency poses a greater threat to society than that posed by an independent criminal actor, the law 'seeks to deter criminal combination by recognizing the act of one as the act of all.' [Citations.] 'In combining to plan a crime, each conspirator risks liability for conspiracy as well as

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[28] Having found that the testimony of Hernandez, Miranda, and Gutierrez was sufficiently corroborated, we may rely on their testimony to determine whether defendants' convictions for attempted premeditated murder is supported by substantial evidence.

the substantive offense; in "planning poorly," each risks additional liability for the unanticipated, yet reasonably foreseeable consequences of the conspiratorial acts, liability which is avoidable by disavowing or abandoning the conspiracy.' [Citation.]" (*People v. Zielesch* (2009) 179 Cal.App.4th 731, 739.)

"The question whether an unplanned crime is a natural and probable consequence of a conspiracy to commit the intended crime 'is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, [the unplanned crime] was *reasonably* foreseeable.' [Citation.] To be reasonably foreseeable ' " '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough....' [Citation.]' " [Citation.] Whether the unplanned act was a 'reasonably foreseeable consequence' of the conspiracy must be 'evaluated under all the factual circumstances of the individual case' and 'is a factual issue to be resolved by the jury' [citation], whose determination is conclusive if supported by substantial evidence. [Citations.]" (*People v. Zielesch, supra,* 179 Cal.App.4th at p. 739, italics in original.)

The crime attempted murder has been found to be a natural and probable consequence of robbery. (*People v. Bradley* (2003) 111 Cal.App.4th 765, 767–772; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 189–190.) "Crimes involving gun use have frequently been found to be a natural and probable consequence of robbery. [Citations.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 408.)

C. <u>Cabbel</u>

Cabbel's conviction for attempted premeditated murder is supported by substantial evidence. Hernandez and Miranda offered conflicting testimony as to whether Guerrero, Sanchez, and/or Gutierrez initially approached them at the party and told them about the plan. However, they were consistent about the basic details of the plan: they were going to be driven to a bar so they could meet men, flirt and "sweet talk" them, try to get money

and drugs from them, bring the men out of the bar, Guerrero and Sanchez would beat them up and rob them, and they would divide the proceeds. Hernandez and Miranda were assured that Guerrero and Sanchez would take care of them and look out for them while they were engaged in this activity.

While Hernandez and Miranda testified Cabbel was not present during the initial planning discussions at the party, Cabbel's statements and conduct strongly raised the inference that she was completely aware of the robbery conspiracy, she knew the details of the plan which had been communicated to Hernandez and Miranda, and she participated in nearly every aspect.

Cabbel was waiting in her car in Gutierrez's carport when Guerrero, Sanchez, Hernandez, and Miranda got in. She did not ask questions about what they were doing and drove to one bar without any instructions. For some reason, they decided not to stop at the first bar, and Cabbel followed Guerrero's directions to drive to the El Prado Bar. During that drive, Cabbel did not ask anyone why they were going there. Instead, she instructed Hernandez and Miranda about what to do when they arrived at the bar: that they should "take … whatever they give us, to take it"; talk to men in the bar, and not refuse if the men offered to buy drinks or drugs, and to "[j]ust talk to them. And don't say no, to take whatever they were offering us."

When they arrived at the bar, Hernandez and Miranda got out of Cabbel's car and Cabbel gave them final directions: they should "go inside this bar," "see what happens," and "to take everything they were offering us." Flores and Marie, who watched the two young women get out of the sedan, testified that the man who matched Guerrero's description got out of the car with the young women and told them to " 'go try,' " " 'go try it,' " or " 'go inside and try.' "

Cabbel's statements in the car were completely consistent with her knowledge of the conspiracy that Guerrero, Sanchez, and/or Gutierrez had shared with Hernandez and

Miranda at the party. She knew exactly why the two young women were being driven to a bar and what they were expected to do, and encouraged and directed them to stick with the plan.

Cabbel's further conduct also evidenced her continued participation in the conspiracy. She did not drive away but instead parked near the bar, consistent with the assurances that the two young women would be watched to make sure they were okay as they tried to execute the plan. When Hernandez and Miranda met the victims in the parking lot, Miranda texted with Cabbel and asked what to do. Cabbel's responses again showed her knowledge of the plan: She encouraged Miranda and Hernandez to go with them, and told Miranda "not to trip, that they got our backs" in case anything happened. Cabbel pulled out of her parking spot near the bar and followed the green van as it left the area. Cabbel's further assurances and conduct were again consistent with the original plan discussed at the party, and that the two young women needed assurances to go through with the plan in case something bad was going to happen.

While Cabbel did not follow the green van to Gonzalez's apartment, her participation in the conspiracy continued as Miranda continued to text with her as the men drove them home. Miranda testified Cabbel told her where the men should take them. Miranda gave the directions in English to Hernandez, and Hernandez translated the directions into Spanish for Gonzalez. When they reached the alley, Guerrero and Sanchez were waiting for the two men, and demanded their wallets. The men resisted, and Gonzalez was fatally shot and Jacobo was seriously wounded.

There is no evidence Cabbel was in the alley, but she had directed Hernandez and Miranda about what to do when they were at the bar, encouraged them to go with the three men, assured them that they would be watched, continued to text with Miranda as the victims drove them home, and gave them the directions which led the victims to park

in the alley, where Guerrero and Sanchez were finally able to perform the robbery that had been planned at the beginning of the evening.

Cabbel's participation had not ended, based on the inferences raised from the call logs for Gonzalez's cell phone: one of the suspects took Gonzalez's cell phone and called Cabbel; Cabbel received the victim's cell phone, consistent with the original plan to split the robbery proceeds; and she exchanged calls with her boyfriend in the minutes and hours after Gonzalez was murdered.

Cabbel contends that attempted murder is only a natural and probable consequence of an armed robbery, there is no evidence that any of the conspirators knew that Guerrero and Sanchez were armed with weapons, and the attempted murder was not a reasonably foreseeable consequence of the conspiracy to commit robbery under the facts of this case. Cabbel cites to the testimony from Hernandez and Miranda, that they were told Guerrero and Sanchez were going to beat up the men they lured from the bar, and no one mentioned anything about weapons.

There are reasonable inferences in the records that the conspirators intended to engage in conduct far more serious than beating up the potential victims, their use of weapons was not unexpected, and that the attempted murder was a reasonably foreseeable consequence of their conspiracy. In their original discussions about the plan, and throughout the evening, Hernandez and Miranda were assured by Guerrero, Sanchez, Cabbel, and (according to Miranda) Gutierrez, that they would be watched while they were at the bar, and when they left with the three men, and they would make sure nothing bad happened to them. These repeated assurances are consistent with the prospect that they might engage in more serious conduct than beating the potential victims.

Based on the entirety of the record and the reasonable inferences from Cabbel's statements and actions, the stabbing and attempted murder of Jacobo was a reasonably

foreseeable consequence of the conspiracy to commit the robbery; that violence would result if the victims resisted.

D. Guerrero

Guerrero has generally joined in all appellate issues raised by Cabbel to the extent applicable to his case, without further analysis. However, his conviction for the attempted murder of Jacobo, based on the natural and probable consequences theory, is also supported by the evidence. Guerrero and Sanchez were obviously waiting for the victims to arrive in the alley, consistent with the directions which Cabbel gave to Miranda. They suddenly attacked the victims, demanded their wallets, did not give them time to react, and immediately brandished weapons at them. Sanchez stabbed Jacobo fairly quickly, and Jacobo passed out before he heard a gunshot. Guerrero likely hit Gonzalez in the face with the gun and then fatally shot him.

As to Guerrero's conviction for attempted murder, the stabbing was a reasonably foreseeable consequence of the conspiracy to commit robbery based on Guerrero's possession and use of the gun, and the manner in which the two men attempted to carry out the robbery.

VII. The Felony-Murder Special Circumstance

Cabbel contends there is insufficient evidence to support the jury's finding on the robbery felony-murder special circumstance as to count II, the murder of Gonzalez, and that she was a "major participant" who acted with "reckless indifference" to human life.

The standard of review discussed in section VI, *ante,* also applies to a substantial evidence challenge to the jury's finding on a special circumstance. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357–358; *People v. Osband* (1996) 13 Cal.4th 622, 690.)

A. The Robbery Felony-Murder Special Circumstance

"The felony-based special circumstances do not require that the defendant intend to kill. It is sufficient if the defendant is the actual killer or either intends to kill *or* 'with

reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission' of the felony. [Citations.]" (*People v. Rountree* (2013) 56 Cal.4th 823, 854, italics added; *People v. Chism* (2014) 58 Cal.4th 1266, 1332; *People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).)

Thus, as applied to Cabbel, "[i]n order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony. [Citations.]" (*People v. Proby* (1998) 60 Cal.App.4th 922, 927, fn. omitted (*Proby*).)

The phrases "major participant" and "reckless indifference to human life" are derived from *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*), where the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree murder who was a "major participant" in the underlying felony and whose mental state is one of "reckless indifference to the value of human life." (*Id*. at p. 158 & fn. 12.)[29] These same standards, developed in death penalty cases, are relevant to determine statutory eligible under the section 190.2 special circumstance for life imprisonment without parole. (*People v. Banks* (July 9, 2015, S213819) __ Cal.4th __ [2015 WL 4116884, p. 9].)

The culpable mental state of "reckless indifference to the value of human life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a

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[29] As noted above, Guerrero broadly adopts all issues raised by Cabbel to the extent applicable to his case, without any argument or analysis. We note the *Tison* standard of "reckless indifference" does not apply when there is proof that a defendant, convicted of the felony murder special circumstance, was the actual killer of the victim. (See, e.g., *People v. Contreras* (2013) 58 Cal.4th 123, 164–165; *People v. Letner* (2010) 50 Cal.4th 99, 192–193.)

grave risk of death." (*Tison, supra,* 481 U.S. at p. 157.) The defendant must be "subjectively aware that his or her participation in the felony involved a grave risk of death." (*Estrada, supra,* 11 Cal.4th at p. 577; *People v. Mil* (2012) 53 Cal.4th 400, 417.)

Tison acknowledged the "reckless indifference" and "major participant" requirements often overlap: "[W]e do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Tison, supra,* 481 U.S. at p. 158, fn. 12.)

The California Supreme Court recently reviewed *Tison* and set forth factors which "may play a role in determining whether a defendant's culpability is sufficient" to affirm the felony-murder special circumstance and life imprisonment without parole. (*People v. Banks, supra,* __ Cal.4th __ [2015 WL 4116884, p. 8].) These factors include: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' (*Tison v. Arizona, supra,* 481 U.S. at p. 157 …) was sufficiently significant to be considered 'major' (*id.* at p. 152 … ;

see *Kennedy v. Louisiana* [(2008)] 554 U.S. [407,] at p. 421)." (*People v. Banks, supra*, __ Cal.4th __ [2015 WL 4116884, p. 8], fn. omitted.)

B. Analysis

Cabbel contends there is insufficient evidence as matter of law to affirm the jury's finding on the felony-murder special circumstance. Cabbel argues she was not a major participant because she did not plan the robbery, she only became involved by giving everyone a ride after they had planned the crime, she nearly thwarted the entire plan when she stopped following the green van, her role was not conspicuous, she did not act as a lookout, she was not present in the alley, and there was no evidence she acted with reckless indifference as required by *Tison*.

While Cabbel's substantive convictions are supported by substantial evidence, we reach a contrary conclusion as to the robbery felony-murder special circumstance. There are strong inferences that Cabbel participated in and knew the details of the robbery plan and conspiracy, based on her statements to Hernandez and Miranda in the car, her instructions to them when they met the victims, went to their apartment, and decided to leave, and her specific directions to lead the victims to the alley where Guerrero and Sanchez were waiting. There are also strong inferences that she knew Guerrero and Sanchez were going to commit an armed robbery when they confronted the victims in the alley. However, there is no evidence that she supplied Guerrero with the gun or she knew anything about the past conduct of Guerrero and Sanchez. There is no evidence Cabbel was in the alley, or that she was parked nearby to watch what happened, as she had done at the bar. Hernandez and Miranda described the chaotic scene at Gutierrez's apartment when they returned with Guerrero and Sanchez. Miranda testified that she briefly saw Cabbel at Gutierrez's house after the shooting, but Miranda did not describe her behavior or conduct. While Cabbel's use of Gonzalez's cell phone raises the inference that she knew the robbery occurred, there is no evidence Cabbel actually knew someone had been

shot or that the two gravely injured victims were lying in the alley. (See, e.g., *People v. Banks, supra*, __ Cal.4th __ [2015 WL 4116884, pp. 9–15].) "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum" to affirm the felony-murder special circumstance and the sentence of life without possibility of parole. (*Id.* at p. 12, citing *Tison, supra*, 481 U.S. at p. 157.)

We are thus compelled to reverse the robbery felony-murder special circumstance as to Cabbel.

DISPOSITION

As to Guerrero, the judgment is affirmed.

As to Cabbel, the jury's finding on the robbery felony-murder special circumstance for count II, the murder of Gonzalez, is reversed, and the indeterminate term of life in prison without possibility of parole is stricken. In all other respects, the judgment against Cabbel is affirmed. The matter is remanded for further appropriate proceedings.

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POOCHIGIAN, A.P.J.

WE CONCUR:

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DETJEN, J.

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PEÑA, J.